84-1047

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

Louie L. Wainwright, Secretary
Department of Corrections
State of Florida

Petitioner,

vs.

Dennis Wayne Smith,

Respondent.

On Petition for Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

APPENDIX OF PETITIONER ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

THEDA JAMES DAVIS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Dennis Wayne SMITH,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary of
Florida Department of Offender Rehabilitation, et al., Respondents-Appellees.

No. 83-3690

United States Court of Appeals,

Eleventh Circuit.

August 23, 1984

Habeas petitioner appealed from an order of the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, Chief Judge, denying his petition for writ of habeas corpus. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) habeas petitioner was entitled to evidentiary hearing on claim of ineffective assistance of counsel for failure to use prior conflicting statements to impeach prosecution witneses; (2) posttrial recantations of accomplice did not warrant habeas relief; (3) claim that accomplice confessed and agreed to testify for the state only because of fear of death penalty was barred by procedural default; (4) admission of testimony concerning facts of second murder for which petitioner was not on trial did not deprive petitioner of fundamental fairness so as to warrant habeas relief; (5) alleged error in admitting testimony of accomplice's wife did not render trial fundamentally unfair so as to warrant habeas relief; (6) fact that psychiatrist retained by petitioner did not read petitioner *Miranda* warnings before conducting examination did not render testimony based on petitioner's statements inadmissible; (7) alleged disparity in sentencing between petitioner and acomplice did not warrant habeas relief; and (8) appellate counsel rendered constitutonally effective assistance.

Affirmed in part, and remanded.

1. Habeas Corpus 59

Habeas petitioner was entitled to evidentiary hearing on claim of ineffective assistance of counsel for failure to use conflicting statements to impeach prosecution witnesses.

2. Criminal Law 641.13(1)

To demonstrate ineffective assistance of counsel, a defendant must show both that attorney failed to render reasonably effective assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different.

3. Habeas Corpus 25.1(8)

Posttrial recantations of prosecution

witness did not warrant habeas corpus relief since such evidence, absent showing that it bore directly on constitutionality of conviction, went to merits of conviction, not its legality.

4. Habeas Corpus 25.1(8)

Habeas petitioner's failure to properly raise under Florida procedure issue that accomplice confessed and agreed to testify for state only because of accomplice's fear of death penalty, in absence of showing of cause for failure to preserve issue and resulting prejudice, barred issue from review in federal courts on petition for habeas corpus.

5. Habeas Corpus 45.2(4)

In order for an evidentiary ruling to be cognizable in habeas corpus, it must deprive state court defendant of fundamental fairness.

6. A denial of fundamental fairness to a state court defendant sufficient to render evidentiary ruling cognizable in habeas corpus occurs when evidence is material in sense of a crucial, critical, highly significant factor.

7. Habeas Corpus 45.2(4)

Although admissiblity of testimony concerning second murder for which habeas petitioner had not been on trial presented a close and difficult question under Florida law, admission of such testimony did not result in a denial of fundamental fairness sufficient to render Florida court's evidentiary ruling cognizable in habeas corpus.

8. Habeas Corpus 45.2(4)

Omission of accomplice's wife from witness list and presence of accomplice's wife during portion of trial that preceded her testimony in violation of sequestration rule, if violation of Florida state law, did not render trial fundamentally unfair so as to warrant federal habeas relief.

9. Criminal Law 412.1(2)

Testimony of psychiatrist retained by defendant through his trial counsel to conduct examination regarding possible claim of insanity was not rendred inadmissible because psychiatrist did not read defendant Miranda warnings before conducting psychiatric examination.

10. Habeas Corpus 45.2(4)

Alleged disparity in sentencing of defendant, who received death penalty for his part in murder, and accomplice, who received sentence of 25 years in prison in accordance with plea bargain, did not violate Federal Constitution so as to warrant habeas relief.

11. Criminal Law 641.13(7)

Appellate counsel rendered constitutionally effective asistnce to defendant who had been sentenced to death for his part in murder, despite contentions that counsel should have challenged on appeal admissiblity of photographs of victim's body during penalty phase of trial, counsel should have argued that Florida procedure providing for bifurcated sentencing hearing was unconstitutional, counsel should have challenged at penalty phase admissiblity of testimony of psychiatrist retained by defendant, appellate counsel wrongly failed to challenge trial court's finding of heinous, atrocious, or cruel aggravating circumstances, appellate counsel should have challenged jury instructions, and appellate counsel should have requested transcription of entire voir dire proceedings.

12. Habeas Corpus 59

District court properly refused to grant evidentiary hearing on habeas petitioner's contention that death penalty in Florida had been discriminatorily applied on basis of race of victim in view of fact that such issue had been conclusively resolved adversely to petitioner.

13. Habeas Corpus 59

District court properly refused to grant evidentiary hearing to habeas petitioner on challenged use of nonrecord material by Florida Supreme Court in reviewing his death penalty case in view of fact that such issue had been conclusively resolved adversely to petitioner.

14. Habeas Corpus 30(1)

Habeas petitioner's claim that

sentence of death was unconstitutional because of state trial judge's faulty instructions to jury concerning aggravating and mitigating circumstances and because trial judge misapplied law concerning use of circumstances by relying on unconstitutional circumstance was barred by procedural default.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

Dennis Wayne Smith appeals to this court from the order of the distict court denying his petition for a writ of habeas corpus. We affirm the district court's judgment in part; however, concluding that

Smith should have received a hearing on some of his claims of constitutional error we vacate in part and remand.

Smith was tried and convicted in a Florida court on one count of first degree murder in late March, 1976. After a sentencing hearing, the trial judge sentenced Smith to death. Smith appealed to the Florida Supreme Court, which affirmed his conviction in Smith v. State, 365 So.2d 704 (Fa. 1978), cert. denied, 444 US. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). In 1981, Smith filed a motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied this motion without a hearing, and Smith appealed. The Florida Supreme Court affirmed the trial court's order in part, but remanded for an evidentiary hearing concerning an alleged violation of the rule in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See Smith v. State, 400 So.2d 956 (Fla. 1982). After holding a hearing, the trial court again denied Smith's motion, and the Florida Supreme Court affirmed in Smith v. State, 421 So.2d 146 (Fla. 1982). On February 9, 1983, Smith filed his petition for a writ of habeas corpus in the district court pursuant to 28 U.S.C. §2254.

The factual background of this case is relevant to several of the issues raised by Smith. The primary evidence at trial against Smith was the testimony of Wesley Johnson, which the Florida Supreme Court summarized as follows:

> After taking part in the murder of John Mitchell Arnsdorff, Wesley Johnson turned himself into the police.

Eventually he was charged with two other murders, as well. In the meantime he implicated Smith in the Arnsdorff murder and accordingly, Smith was indicted for first degree murder. Smith pleaded not guilty and the cause was set for trial. Before its start, Johnson pleaded nolo condendere to the three murders and was to be given concurrent life sentences in return for testimony against Smith, the sentences to be imposed after the testimony.

Johnson testified to the following: He, Smith and a man named Wagner met at a bar and decided to rob a homosexual in order to obtain money for beer. The three then went to another bar where they met Arnsdorff. On the pretext of giving a party, they invited him to a shack Johnson was staying in. Arnsdorff and Johnson drove in Arnsdorff's car, Smith and Wagner in Smith's car. Johnson and Arnsdorff reached the shack first. Smith and Wagner had taken a wrong turn and were late, but Johnson kept Arnsdorff from leaving by showing him some silver casting equipment. When the former two arrived the men drank beer for a short while and then Johnson grabbed Arnsdorff while Wagner threatened him with an ice pick. While Arnsdorff was restrained Smith took

Arnsdorff's wallet, in which there was $600 from his car and one of the three removed his wrist watch. They then forced Arnsdorff into the trunk of his own car. Their intention was to abandon him in a remote spot. Wagner and Johnson, in Arnsdorff's car, were following Smith in his car when they ran into a bridge abutment, flattening a tire. (Throughout the night the three had been drinking heavily.) After an unsuccessful attempt to fix it, the two cars proceeded until the wheel with the flat tire came loose. One of the three opened the trunk and Smith hit Arnsdorff with a tire tool. Wagner then began to stab him with the ice pick. Believing Arnsdorff to be dead they shut the trunk with him in it and went to a gas station. Smith told Wagner to get some gas, which he did. They returned to Arnsdorff's car and at Smith's direction, Johnson doused it with gas and set it afire. (Expert opinion that Arnsdorff died from incineration or asphyxiation from smoke caused by the fire had been introduced into evidence earlier.)

At this point in Johnson's narration the court excused the jury to allow the defense to renew a pre-trial motion that testimony by Johnson as to a second murder by him and Smith be suppressed. The court denied the motion, as it had previously done, on the ground that the second murder, though separate from the first, was part, just as Arnsdorff's of a single transaction, the robbery, and therefore, relevant to the Arnsdorff murder.

Johnson then testified that after burning the car he, Smith and Wagner immediately went to a swimming hole. An argument over division of the $6.00 and watch ensued between Smith and Wagner. Smith yelled to Johnson to grab Wagner, and while Johnson held him Smith stabbed him with the ice pick. At Smith's direction Johnson pulled Wagner into the swimming hole and held him under water to ensure his death. They transported his body elsewhere and buried it.

Smith took the stand in his own defense He admitted that he was in the company of Wagner and Johnson on the night of the murder, but claimed that the robbery was their idea. Although he accompanied them to the second bar and left it with them and the victim, he testified that they drove him straight from the bar to his apartment, because he was too intoxicated by beer and drugs to do anything but sleep. That was the last, according to Smith, he saw of them that

> night. No evidence was introduced by the defense to corroborate the alibi.

365 So.2d at 705 - 06 (footnoted omitted). We will develop other facts as they become relevant to our opinion.

I. NEED FOR AN EVIDENTIARY HEARING

[1] Smith contends that the district court erred in refusing to grant him an evidentiary hearing concerning three of his claims for relief -- that his counsel rendered ineffective assistance, that the state Rule 3.850 hearing concerning the alleged Brady violation was not full and fair, and that his execution in light of recantations by Wesley Johnson would violate due process.[1] Although the legal analysis of Smith's right to a hearing

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[1] Smith also asked for an evidentiary hearing on other issues. We will address those claims separately.

differs greatly for each claim, we discuss them together because each claim has a common factual basis -- the numerous statements of Wesley Johnson. We conclude that, under Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), the district court should have granted Smith an evidentiary hearing on his claim of ineffective assistance of counsel. Given the interrelationship of this issue with the Brady issue, the hearing that must be held will necessarily concern both issues. The district court did not err in refusing a hearing concerning Johnson's recantations.

As the quoted excerpt from the opinion of the Florida Supreme Court indicates, Wesley Johnson was the primary witness against Smith. The record[2] shows that in early September, 1975, Johnson presented himself to the Polk County Sheriff's Department and confesed to three murders. He claimed to have killed Caleb McDowell, John Mitchell Arnsdorff (whom Smith is convicted of murdering), and James Wagner. The transcript of Johnson's statement and the report of the Polk County Sheriff's Office, dated September 6, 1975, indicate that Johnson told the following story concerning the second and third victims.

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[2] Our record is somewhat unclear concerning some events. For example, it is doubtful that we now have before us all the statements of Wesley Johnson and Patricia Johnson, his wife. See Smith v. State, 400 So.2d 956, 953 n. 1 (Fla. 1981) (listing statements). Although we beleive our construction of the events to be substantially accurate, on remand the district court may expand the record and correct any misconceptions in our opinion.

Johnson met Wagner in a bar in Lakeland, Florida. Johnson and Wagner went to another bar, the Green Parrot, where they met Arnsdorff. The three journeyed first to Johnson's apartment and then to Arnsdorff's where Johnson and Wagner robed Arnsdorff of eleven dollars, tied him hand and foot, and put him into the trunk of his car. Johnson and Wagner promised Arnsdorff that they would drive him into the woods and leave him so that, "if he [had] enough energy," he could kick out the back seat of the car.

Johnson and Wagner drove away, but, after leaving Lakeland, they wrecked and the car became stuck in a ditch. Johnson stated that he then opened the trunk and hit Arnsdorff with a jack handle as Arnsdorff begged for mercy. Johnson stated that he stabbed Arnsdorff with the sharp end of the jack and with a knife, while forcing Wagner to watch. Jonson and Wagner then climbed into a second car and drove away. Johnson refuesed to explain why a second car was with them, although the police asked him to do so. The two drove to a gas station and bought some gas. They then returned to the wrecked vehicle, doused it with gasoline, and set it afire with Arnsdorff in the trunk. This was the extent of what Johnson related concerning Arnsdorff's murder; he did not mention Smith.[3]

On September 8, an officer interviewed Wesley Johnson's wife, Patricia

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[3] The September 6 statement is relevant to this case for one reason in addition to Johnson's omission of Smith. In describing his murder of McDowell, which occurred two years before the other murders, Johnson indicated that he also locked the victim in the trunk of a car and set the car on fire after dousing it with gasoline.

Johnson. In this interview, she stated that Wesley had told her that both he and Smith had murdered Arnsdorff. Although Smith submitted this statmeent to us after argument, it is not in our record. Our record indicates that Patricia Johnson had, however, made a previous statement that omitted any reference to Smith.

On September 10, Patricia Johnson notified the officers that Wesley "wanted to tell the whole story about the three murders." Polk County Sheriff's Report at 6. She asked to meet Wesley. After talking with his wife, Johnson informed the police that he would prefer not to give a statement until his attorney could discuss a plea bargain. He indicated, however, that Smith had been with him on the night Arnsdorff was murdered and "did take part in the same." _Id_. Sometime subsequent to this, Johnson apparently came to the agreement he desired[4] with the prosecutor and gave a statement implicating Smith. He stated that Smith had actually struck Arnsdorff with the tire jack. Johnson stated that Wagner stabbed Arnsdorff with an ice pick while Smith used the jack handle. Johnson then stated that he could not remember "exactly what happened right at the moment . . . we all looked around [and] I stepped up and slammed the [trunk]." Johnson also testified that, after returning with the gas, "[we] got out of the car and Slick's [Smith] got the gas can. So I poured the gas all over it. And Slick gets back in the car, and what's his name throwed a match on it."

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[4] Johnson testified at Smith's trial that he agreed to plead no contest to the three murders and testify against Smith in exchange for concurrent life sentences. Johnson was sentenced after Smith's trial.

In response to a clarifying question, Johnson indicated Wagner to be the person referred to as "what's-his-name." He also indicated in detail how he (Johnson) doused the car with gasoline.

As far as we can determine, Johnson made one other pretrial statement relevant to our decision. The trial transcript shows that Johnson sent a note to Smith while both were incarcerated before trial. The note read as follows:

> Hey, Slick, how are you doing? Okay? Well, the next time they say court, it's for real. Just keep cool. You can have Parks called because I made sure he heard me talking about how I done it by myself and it's like that. Just heard on the news that they, they are going to bring back the chair. Hope I miss it. Well, just stay cool. Jake.

Apparently, this note indicates that Johnson confessed to another inmate named Parks so that Smith could call Parks at trial to impeach Johnson.

At trial, Johnson testified that Smith murdered Arnsdorff. Smith's counsel impeached Johnson with only the note written concerning Parks. The state then called Patricia Johnson in rebuttal to testify that Wesley had made prior statements consistent with his story implicating Smith. Since the trial, Johnson has made numerous sworn recantations of his trial testimony, stating that he lied at trial when implicating Smith and that he committed the crime himself.

A. Effective Assistance Claim

In his brief, Smith argues that his trial counsel was ineffective. He lists the following "errors and omissions" at the guilt/innocence phase of the trial:

> 1. Failure to seek a Richardson hearing and challenge the admissibility of the testimony of Patricia Jonson under the

rule of sequestration;

2. Failure to use Paricia or Wesley Johnson's pretrial statements for impeachment;

3. Failure to interview Smith adequately; and

4. Failure to depose Wesley Johnson before trial.

Smith also contends that his attorney, during the penalty phase:

1. Failed to adduce appropriate mitiagating evidence or properly use that evidence in closing argument;

2. Failed to seek jury instructions on reasonable doubt or object to other instructions;

3. Failed to understand the bifurcated proceeding; and

4. Failed to challenge the use of the heinous, atrocious, and cruel aggravating circumstances.

[2] In Strickland v. Washington, __ U.S. __, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth the test under which we review claims of

ineffective assistance. See also Jarrell v. Balkcom, 735 F.2d 1242, 1261 (11th Cir. 1984). The petitioner must show both that his attorney faied to render "reasonably effective assistance," id. at 2064, and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 2068. With some exceptions not applicable here, see id. at 2067; see also United States v. Cronic, __ U.S. __, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the inquiry is two-pronged. The petitioner must show both ineffective assistance and resulting prejudice.

In this case, only one of Smith's claims -- that counsel should have more effectively impeached the Johnsons -- merits discussion and possible relief.

The claimed failure of his attorney to understand the bifurcated proceeding and act as an advocate is related to the failure to impeach issue. The other claims are either unsupported by the record or simply do not merit relief.[5]

Counsel's failure to depose Johnson does not warrant relief or a hearing; given the numerous inconsistent statements made by Johnson and his wife, counsel probably had no need to conduct such a deposition. Had a deposition produced testimony detrimental to Smith, it would have been available to the state as evidence to disprove recent fabrication. (The state Rule 3.850 court held that Smith's counsel had available all the statements we have set forth above.) We are unable, without an evidentiary hearing, to reach a conclusion concerning ineffectiveness in light of counsel's failure to cross-examine Wesley or Patricia Johnson by using their pretrial statements, however.[6] The District court concluded that the attorney failed to use the statements for a valid strategic reason: he preferred to emphasize Johnson's plea bargain for impeachment purposes. Without a hearing,[7] we cannot hold this to be a valid reason for counsel's failure to use the Johnsons' statements not implicating Smith. Use of these statements would have been totally consistent with counsel's assumed strategy of showing that Johnson implicated Smith only to save himself from the electric chair.

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[5] For a discussion of the claims regarding erroneous jury instructions and the application of the heinous, atrocious and cruel aggravating factor, see infra section VII (discussing claims in context of ineffective assistance of appellate counsel). Our conclusion concerning these issues does not change in light of the different test for appraising the effectiveness of trial counsel.

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[6] The entire transcript of the cross examination is attached to this opinion as Appendix A.

[7] A hearing will also be helpful to clarify the record. See supra note 2.

We also hold that counsel's failure to use the statements may well have resulted in prejudice under the test in Strickland v. Washington. The entire case of the state, with the exception of plaster casts of a tire track and a shoe print,[8] was based on the testimony of Wesley Johnson as buttressed by Patricia Johnson's testimony during the state's rebuttal case. When first questioned, however, neither witness implicated Smith: the September 6 statements[9] of both witnesses omit any reference to Smith. Only after Patricia Johnson conferred with Wesley on September 10 did Wesley implicate Smith -- stating that Smith was involved, but that a plea bargain discussion must occur before he would provide any further information.

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[8] The tire track matched Smith's car's tires; the shoe print matched a pair of shoes Smith owned. Smith explained that he had loaned the car, with the shoes in the back, to Johnson.

Two conclusions may be drawn from these facts. The first is that Wesley and Patricia Johnson "framed" Smith, as Wesley's recantations would indicate. This conclusion is supported by the timing and order of the statements, and, to some extent, by Johnson's admission on September 6 that he locked his first victim in the car trunk and set the car on fire. Smith's attorney might well have argued that Johnson -- who had a history of similar murders -- implicated Smith to avoid "the chair," as Johnson stated in his note. The second, contradictory conclusion is that Wesley simply omitted any reference to Smith for some unknown reason -- and later told the truth. This interpretation is supported by Johnson's suspicious reference to a second car in his September 6 statement without elaborating concerning its source or its dirver. Nevertheless, the choice between the two interpretations would have been one the jury could have made either way had they heard the facts. The jury's choice could well have affected the outcome of the trial.

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[9] Other, more minor, inconsistencies appear among Johnson's statements. For example, Johnson's trial testimony cast Smith more as the ringleader than did his statement made after September 10.

The failure of counsel to use these statements to impeach the Jonhsons may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt." In rejecting the contention that the Constitution requires different juries at the penalty and guilt phases of capital trial, we stated:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and yet some genuine doubt exists. It may reflect a mere possiblity; it may be but the whimsy of one juror or several. Yet this whimsical doubt -- this absence of absolute certainty -- can be real.

> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futiltity when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Smith v. Balkcom, 660 F.2d 573, 580 - 81 (5th Cir. Unit B 1981), modified, 677 F.2d 20, cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). in this case, use of Wesley and Patricia Johnson's prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Of course, counsel may have elected

to choose another strategy at the penalty portion of Smith's trial. If he did so, however, the record does not reveal the content of the strategy. For example, in counsel's closing statement at the penalty phase,[10] he evidenced no reasonable strategy. Counsel stated (in full):

> MR. HADDOCK: May it please the Court? Ladies and gentlemen, this is the last time we will be beore you. The most trying circumstances, the fact that will be sent back to you will be cumulative of what you have already decide, that the defendant is guilty. Now, with little help except from you -- and you are not here to help me, you are here to do the right thing -- I have to ask that you take into consideration all of the things

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[10] We note that counsel was somewhat confused by the bifurcated proceeding in any event. He repeatedly requested that the judge abandon the bifurcated procedure and use the procedure declared unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.cT. 2726, 33 L.Ed.2d 346 (1972).

> that have been said, all of the things that have been admitted into evidence. In particular, consideration to the statements of Dr. Kaplan pertaining to Mr. Smith.
>
> Weigh those, because they weigh heavily upon everybody in this room. Add them up. If they indicate to you that this man, who has made a statement that you can take or leave -- because you have taken and left some of his statements --- that he would spend the rest of his life in a penitentiary. Whether this man should die or be given the right to live until, God willing, someday this state will provide a place for him.

If the state desires to do so, on remand it is free to introduce evidence before the district court showing that trial counsel's failure to utilize the Johnsons' statements at either the guilt/innocence or penalty phases of the trial was prompted by reasonable trial strategy.

B. The Brady Issue

Smith contended before the state Rule 3.850 court that he did not receive material evidence from the state before trial pursuant to his request under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The state court held a hearing and concluded that the requested material was available to Smith's counsel. Smith now contends that this finding of fact by the state court is incorrect and not entitled to a persumption of correctness under 28 U.S.C. §2254(d) because his trial counsel never testified at the hearing. He notes that the testimony at the hearing indicated that the prosecutor, although he maintained an "open file" policy, could not recall whether the various statements were in the file at any particular time. Smith himself testified that he could not recall seeing or hearing about the statements, except for the statement made after September 10 by Wesley Johnson.

We do not hold that these circumstances support a finding that the hearing was not full and fair;[11] indeed, we see no need to pass on this question. When the district court conducts its hearing on the effectiveness of Smith's counsel, the inquiry will by necessity involve the availability of the statements. For example, the state might produce Smith's counsel and introduce his testimony that he did not use the statements because he did not have them. If he did not have them because he did not check the prosecutor's file, this would constitute ineffective assistance given the content of the statements. But, if the statements were not available, counsel could not use them.

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[11] For example, Smith does not explain why he could not have deposed his attorney, even if he was unable to subpoena him. Cf. Birt v. Montgomery, 725 F.2d 587, 590 n.5 (11th Cir. 1984) (en banc) (noting possiblity that petitioner could depose witness without passing on sufficiency of state hearing).

If the district court should conclude after an evidentiary hearing that the statements were not available to trial counsel, Smith will be confronted with a variation of Catch-22 created in part by 28 U.S.C. §2254(d). The state could presumably argue that state court's finding that the statements were available in a historical fact entitled to a presumption of correctness, but that counsel rendered effective assistance under the circumstances because the statements were, in fact, unavailable. Such a situation no doubt results from the difficulties inherent in the administration of justice by means of the writ of habeas corpus. Nevertheless, if this situation arises, the district court should conclude that, under 28 U.S.C. §2254(d)(3), "the material facts were not adequately developed at the state court hearing," see Thomas v. Zant, 697 F.2d 977, 980 (11th Cir. 1983), and issue the writ under Brady v. Maryland.[12] We have no doubt that statements were "material either to guilt or to punishment" under Brady. 737 U.S. at 87, 83 S.Ct. 15 1196.

C. Recantations of Wesley Johnson

Finally, Smith contends that the

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[12] Smith correctly notes that the state court's finding was supported by somewhat weak evidence. In addition, the state court did not hold an evidentiary hearing on Smith's effective assistance of counsel contention, although he requested a hearing.

district court should also receive evidence concerning the post-trial recantations of Wesley Johnson. A panel of this court recently addressed a similar claim in Drake v. Francis, 727 F.2d 990 (11th Cir. 1984). This court vacated the opinion in Drake for en banc consideration, and we recently received briefs and heard oral argument on several issues raised in Drake. We see no need to hold this case pending the decision in Drake, however. We perceive that the panel in Drake accurately stated the law in this circuit concerning claims of newly discovered evidence in habeas corpus proceedings.

As long ago as 1958, the former Fifth Circuit Court of Appeals summarized the law in this area: "Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not its legality." Shaver v. Ellis, 255 F.2d 509, 511 (5th Cir. 1958), cert. denied, 355 US. 864, 78 S.Ct. 98, 2 L.Ed.2d 70 (1957). To be distinguished are situations in which the new evidence bears directly on the constitutionality of the conviction. For example, in Schneider v. Estelle, 552 F.2d 593 (5th Cir. 19877), the petitioner claimed new evidence would show that the state had suborned perjury in obtaining a conviction against the petitioner. The court remanded for an evidentiary hearing, holding that the writ should issue if the petitioner proved the allegations of his complaint. Id. at 596; see also Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969).

[3] In this case, we seriously

doubt that Smith has alleged subornation of perjury by the state. To prove such a claim, Smith would have to show that the prosecutor or the police officers knew that the testimony of one of the Johnsons was false. Schneider, 552 F.2d at 595; Smith, 410 F.2d at 1350 - 51. Smith has made no proffer of any evidence supporting such a contention. Absent such evidence, this claim does not warrant habeas corpus relief.

II. COERCION OF TESTIMONY

Smith next contends that Johnson confessed and agreed to testify for the state only because of Johnson's fear of the death penalty. Smith notes that one of the terms of Johnson's plea bargain required him to testify before he received his sentence. Smith argues that he should have received an evidentiary hearing on the issue in the district court.

We have little difficulty accepting the validity of the argument that Johnson entered into his plea bargain agreement with the state and testified against Smith because of the possible imposition of the death penalty. Nevertheless, the district court properly held that this claim affords Smith no basis for relief.

[4] We have substantial doubt that this claim is one that warrants relief. Cf. United States v. Ballard, 586 F.2d 1060 (5th Cir. 1978); Chaney v. Wainwright, 561 F.2d 1129 (5th Cir. 1977), 443 U.S. 904, 99 S.Ct. 3095, 61 L.Ed.2d 871 (1979). It is clear that Smith's attorney cross-examined Johnson and revealed the facts underlying Johnson's testimony to the jury, which decided whether or not to believe Johnson. We need not consider this

issue on its meritS, however, because Smith failed properly to raise it under Florida procedure. The Florida courts have refused to address the issue, see Smith v. State, 400 So.2d 956, 959 (Fla. 1981); and, absent a showing of cause for failure properly to preserve the isssue and resulting prejudice, the issue is barred from review in the federal courts, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct 2497, 53 L.Ed.2d 594 (1967) Smith has shown neither cause nor prejudice.

III. ADMISSION OF EVIDENCE OF SECOND DEGREE MURDER

At Smith's trial, the judge allowed Wesley Johnson to testify concerning the facts of a second murder for which Smith was not on trial. (The circumstances and content of this testimony are set forth in the portion of the Florida Supreme Court's opinion quoted in the introductory portion of this opinion.) The Florida court apparently admitted this testimony on the theory that it constituted part of the res gestae. See Smith v. State, 365 So.2d 704, 706 n.2 (Fla. 1978). Smith contends that the evidence was irrelevant, inflammatory, prejudicial, and inadmissible as a matter of constitutional law.

[5 - 7] In reviewing the disposition of this claim by the district court, we note that "[i]n order for an evidentiary ruling to be cognizable in habeas corpus, it must deprive the state court defendant of fundamental fairness." Jameson v. Wainwright, 719 F.2d 1125, 1126 (11th Cir 1983), cert. denied, __ U.S. __, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984); see also Hills v. Henderson, 529 F.2d 397 (1976). A denial of fundamental fairness occurs when the evidence is "material in the

sense of a crucial, critical, highly significant factor." id. at 1127. Under this test, the admission of the evidence did not violate the Constitition, although its admissiblity under state law presents a close and difficult question. See 365 So.2d at 708 (three Justices dissenting).

IV. TESTIMONY OF PATRICIA JOHNSON

[8] At Smith's trial, the state introduced the testimony of Patricia Johnson, Wesley Johnson's wife. (Wesley Johnson was the prosecutor's essential witness. See supra §I.) The prosecutor called Patricia Johnson to testify concerning prior consistent statements made by her husband in response to Smith's impeachment. The witness list submitted to Smith before trial by the prosecutor did not include Patricia Johnson's name, as Florida law requires. In addition, the

record shows that Patricia Johnson was present during a portion of the trial that preceded her testimony and was thus in violation of the sequestration rule. Smith argues that the omission of Patricia Johnson's name from the witness list and the sequestration rule violation compels the issuance of the writ. Smith, however, cites no authority to the effect that these violations are of constitutional dimension. See, e.g., Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981) (state law violations do not usually warrant habeas relief). Assuming that the claim is simply one rooted in the concept of "fundamental fairness," see Donnely v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 432 (1974), we conclude that these violations (if they were violations)[13] did not render Smith's trial fundamentally unfair.

V. TESTIMONY OF DR. NISWONGER

[9] Dr. Joseph K. Niswonger, a psychiatrist, examined Smith before trial. Niswonger testified that, during the examinaion, Smith claimed amnesia concerning the event of the murder. The state argued to the jury that this testimony contradicted Smith's alibi that he did not commit the murder, but was at home "sleeping off a drunk." Smith now contends that, under the rule of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), Niswonger's testimony was inadmissible because Niswonger did not read Smith

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[13] The prosecutor explained the omission of Patricia Johnson's name from the list and her presence in the courtroom by contending that he had not forseen that he would call her as a witness.

Miranda warnings before conducting the psychiatric examination. See also Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981). The state contends that this claim is barred from consideration by Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1976), and that the claim also fails on the merits. The state's argument concerning the merits of this claim is correct; we therefore chose not to address the Wainwright issue, which presents a question of law not yet squarely addressed by this court.

The record in this case shows that the trial court did not appoint Niswonger to examine Smith, as was the case in Estelle v. Smith. On the contrary, Smith retained Niswonger (through his trial counsel) to conduct an examination regarding a possible claim of insanity. In such a case, Estelle v. Smith does not require that the psychiatrist give Miranda warnings.[14] The protections of Estelle do not apply unless the psychiatist is "essentially . . . an agent of the State . . . " 451 US. at 467, 101 S.Ct. at 1875.[15] thus, the district court properly denied the writ on this issue.

VI. DISPARITY IN SENTENCING

[10] After the penalty hearing, the

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[14] Smith apparently does not contend that all psychiatrists examining all defendants must give Miranda warnings to remind the defendant not to make a statement he later may regret.

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[15] Smith contends that the trial judge's post-trial order adding Niswonger to the list of state psychiatrists made Niswonger an agent of the state. This contention is without merit. The judge's revision of the list did not change Niswonger's de facto status during the examination or at trial.

trial judge sentenced Smith to death. Wesley Johnson, in accordance with his plea bargain, received a sentence of only twenty-five years in prison. Smith contends that this disproportionate punishment violates the Constitution given his "lesser culpability" than Johnson. He requests this court to conduct an independent review of the record and grant relief on this issue, citing as support Barclay v. Florida, __ U.S. __, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). This contention lacks merit. See generally Pulley v. Harris, __ U.S. __ 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); Collings v. Francis, 728 F.2d 1322 (11th Cir. 1984); Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); Henry v. Wainwright, 721 F.2d 990 (5th Cir. Unit B

1983), cert. denied, __ U.S. __, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984).

VII. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

[11] Smith next contends that the district court should have granted him an evidentiary hearing on his claim that his appellate counsel rendered constitutionally ineffective assistance. We recently described the legal basis for this type of claim in Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984), as follows:

> Although we address claims of ineffective assistance of counsel on appeal much less frequently than claims of ineffective assistance at trial, it is well established that a defendant has the right to effective counsel on appeal. See Anders v. California, 386 U.S. 738, 741 - 42, 744, 87 S.Ct. 1396, 1398 - 99, 1400, 18 L.Ed.2d 493 (1966) (counsel must function as advocate on behalf of client). In order to prevail, Alvord must prove that he did not receive "'reasonably effective

representation,'" Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982) (citing previous cases), cert. denied, [_U.S. _] 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); however, counsel need not provide perfect assistance, id. From the reported cases, it appears that counsel's failure to file a brief is in most cases ineffective, see Anders; Mylar; however, counsel's failure to advance erors on appeal later gaining "judicial recognition" does not contittute unconstitutional aid. Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir), cert. denied, [__U.S. __] 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), and counsel need not brief issues reasonably considered to be without merit, Mendiola v. Estelle, 635 F.2d 487, 491 (5th Cir. Unit A. 1981); Hooks v. Roberts, 480 F.2d 1196, 1197 - 98 (5th Cir. 1973), cert. denied, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Alvord contends that the issues not raised by his counsel were of substantial merit As we stated in Hooks, the best way to evaluate "this question . . . is to examine the alleged trial errors to see if they contain sufficient merit . . . that his appellate counsel can be faulted for not having raised the." 480 F.2d at 1197.

Id. at 1291. Under the applicable standards, we conclude that Smith's counsel rendered constituionally effective assistance and that no evidentiary hearing is required.

Smith first contends that his counsel should have challenged on appeal the admissibility of photographs of the victim's body during the penalty phase of the trial. We cannot fault Smith's attorney for omitting this claim. The photographs were clearly relevant to the case because the state relied on the "heinous, atrocious, or cruel" aggravating circumstance enumerated in the Florida statute. See Fla. Stat. §921.141(5)(h). The circumstances of the crime as evidenced by the condition of the victim's body are material to consideration of this aggravating circumstance. In addition, under Florida law, it appears to be settled that such photographs are admissible. See Calloway v. State, 189 So.2d 617 (Fla. 1966); Mardorff v. State, 143 Fla. 64, 196 So. 625 (1940).

Smith next contends that his counsel should have argued that the Florida procedure providing for a bifurcated sentencing hearing is unconstitutional. This contention lacks merit. The Supreme Court specifically upheld this statute in Proffitt v. Florida, 428 US. 242, 96 S.Ct. 1960, 49 L.Ed.2d 913 (1976), and we recently rejected this claim in Smith v. Balkcom, 660 F.2d 573, 580 - 81 (5th Cir. Unit B 1981), modified, 677 F.2d 20, cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

Smith argues that his counsel should have challenged the trial court's decision to admit Dr. Niswonger's testimony at the penalty phase of his trial. Counsel need not have raised this claim on the basis of the fifth amendment; we have decided above that such a challenge lacks merit. See supra §V. In addition, counsel could reasonably have concluded that Smith had waived the psychiatrist-patient privilege by introducing Dr. Niswonger's report as to Smith's sanity into evidence at the competency hearing. See Fla. Stat. §90.242(b) (providing for waiver of privilege).

Smith also argues that his appellate attorney wrongly failed to challenge the trial court's finding of the "heinous, atrocious, or cruel" aggravating circumstance. See Fla. Stat. §921.141(5)(h). Smith contends that Johnson's testimony at trial demonstrated that the "participants" thought the victim to be dead after they kidnapped him, transported him a considerable distance in a car trunk, struck him with a tire tool (while he pleaded for mercy), stabbed him with an ice pick, and locked him back in the car trunk. Thus, although the medical reports later showed that the victim died when the participants poured gasoline on the car and burned it, the murderer(s) could not have known they had done anything except destroy evidence. Under Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), Smith contends that this was not a proper case for application for the subsection (5)(h) circumstance. We believe Smith's counsel could reasonable decide not to raise this issue on appeal.

Smith next contends that his appellate counsel should have challenged the trial court's jury instructions, which did not explain that the state must prove the existence of aggravating circumstances beyond a reaonable doubt. See Williams v. State, 386 So.2d 538 (Fla. 1980). The district court noted: (1) that trial counsel never requested such a charge, and (2) that the jury never was charged concerning any burden of proof except that of beyond a reasonable doubt. We hold that, under the circumstances, counsel need not have raised this issue on appeal. See Alvord, 725 F.2d at 1292 (instruction never requested); Henry v. Wainwright, 721 F.2d 990, 995 (5th Cir. Unit B 1983) (jury never heard instruction on any other burden of proof), cert. denied, __ U.S. __, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984).

Finally, Smith contends that his attorney should have requested the court reporter to transcribe the entire voir dire proceedings to determine whether a violation of Witherspoon v Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), occurred. This contention is purely speculative; Smith has not shown that, in fact, a violation occurred. Thus, Smith has neither alleged nor proven that the failure of his attorney to raise this issue made any difference whatsoever.

VIII. MISCELLANEOUS ISSUES

[12] Smith contends that the death penalty in Florida has been discriminatorily applied on the basis of the race of the victim; he argues that the district court erred in refusing to grant an evidentiary hearing on this issue. The district court acted properly; as the state notes, this issue has been conclusively resolved adversely to Smith. See Sullivan

v. Wainwright, 721 F.2d 316 (11th Cir. 1983), application for stay denied, Sullivan v. Wainwright, __U.S.__ , 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); Wainwright v. Ford, __ U.S. __, 104 S.Ct. 3498, 81 L.Ed.2d __ (1984); Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984).

[13] In this section of his brief, Smith also challenges the use of non-record material by the Florida Supreme Court in reviewing his case. This issue has also been resolved adversely to Smith. See Ford v . Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), cert. denied, U.S. __, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

[14] Smith also argues that his sentence is unconstitutional because of the trial judge's faulty instruction to the jury concerning aggravating and mitigating circumstances and because the trial judge misapplied the law concerning the use of the circumstances by relying on an unconstitutional circumstance. Without belaboring this point, we hold that the district judge correctly decided that this claim is barred by a procedural default under Wainwright v. Sykes. Smith contends that he has proffered facts entitling him to an evidentiary hearing on the issue of cause and prejudice, but we disagree. As to the claims concerning restrictions of mitigating evidence, Smith has failed to show prejudice for exactly the reasons enumerated in Ford v. Strickland, 696 F.2d at 812 - 13. And, as to the claim of

reliance on an unconstitutional aggravating circumsantce, Smith has failed to proffer any evidence or explanation constituting cause for his failure timely to raise this issue in the state court.

The judgment of the district court is AFFIRMED IN PART, VACATED IN PART, and REMANDED for proceedings not inconsistent with this opinion.

APPENDIX A

CROSS-EXAMINATION OF WESLEY JOHNSON

EXAMINATION BY MR. HADDOCK:

Q. Mr. Johnson, you are putting me in the unique position of asking you a direct question, which I doubt I will get a straight answer from you about it.

MR. CAMPBELL: Now, Your Honor,--

Q. When are you lying, then or now?

THE COURT: Mr. Haddock, I don't want any dialogue of that sort.

MR. HADDOCK: That was a proper question, Your Honor.

THE COURT: Ask a question, but I don't want dialogue. I don't want editoralizing.

MR. HADDOCK: Prior to asking any question, Your Honor, I would like at this time to move for a mistrial in this case because of the unnecessary presentation of evidence over my prior objection out of the absence of the jury pertaining to a separate crime for which this defendant has been individually indicted and upon which there is a separate case before the Court, and upon which the defendant stands the possibility of subsequent trial.

THE COURT: Motion denied.

MR. HADDOCK: This is so horrendous, it's so prejudicial --

MR. CAMPBELL: How many times do we have

to go through the same thing, Your Honor?

THE COURT: Just a moment, Mr. Campbell. Go ahead.

MR. HADDOCK: May I finish, Your Honor? This is so horrendous and prejudicial to the defendant's cause before the jury that I see virtually no way of ever getting it straightened out.

THE COURT: Motion denied.

Q. Answer my question, Mr. Johnson.

MR. CAMPBELL: I thought that question was objected to.

THE COURT: You will have to reask the question.

Q. Are you telling the truth now or when you testified to the police officers?

A. I am telling the truth now.

Q. Let me ask you something. Have you ever seen this before [indicating]?

A. Yes.

Q. What is it?

A. That is a confession, I suppose, it's a note I sent [indicating].

Q. Was it written by you?

A. Yeah.

Q. Signed by you as Jake?

A. Yeah

Q. Is that a name you are known by from time to time?

A. Yeah.

Q. How was it, what was disposed--what was the disposition of this note, if you know?

A. It was at a time when I was thinking about cutting him loose.

Q. Speak up.

A. At a time when I was thinking about cutting him loose.

Q. Was it addressed to--did you have it sent to Smitty?

A. Yes.

MR. HADDOCK: Your Honor, I would like to introduce this into evidence.

MR. CAMPBELL: No sir, not--

THE COURT: It would be proper to identify it now and introduce it later.

MR. HADDOCK: I think I can introduce it since he is the State's witness.

MR. CAMPBELL: No sir, you can't introduce it in the State's portion of the case.

THE COURT: That's right. You mean the Court's witness?

MR. HADDOCK: The Court's witness.

THE COURT: It will be identified as Defendant's Exhibit 1. [The purported confession was marked as Defense Exhibit 1 for identification.]

Q. Does this note say, can you read that note?

A. Do you want me to read it out loud?

Q. Read it to the jury, yes.

A. "Hey, Slick, how are you doing? Okay? Well, the next time they say court, it's for real. Just keep cool. You can have Parks called because I made sure he heard me talking about how I done it by myself and it's like that. Just heard on the news that they, they are going to bring back the chair, I hope I miss it. Well, just stay cool, Jake."

Q. And Jake is you?

A. Part-time.

Q. That's right? You are Jake?

A. Sometimes.

Q. What is you deal with the state?

A. 25 to life.

Q. How many crimes did you confess to?

MR. CAMPBELL: Judge, that--

A. Three.

MR. CAMPBELL: -- Your Honor, I don't have any objection to those related to--no. I withdraw the objection I believe the answer was three.

THE COURT: That's correct.

Q. And you say what, 25 to life?

A. [Nods head.]

Q. Were there any stipulations pertaining to that?

A. What do you mean, to the sentence?

Q. Yes.

A. That I testify.

Q. Testify to what?

A. To the murders.

Q. Did it have anything to do with the implication of the defendant here, Mr. Smith?

A. Yes.

Q. And that was part of the deal?

A. That I testify to the murders for the state, yeah.

Q. And have you been sentenced yet?

A. No, not that I know of.

Q. Is it your understanding that you will not be sentenced until after you give your testimony?

A. Right.

Q. Therefore your testimony is based upon your not going to the electric chair, is that right?

A. Well, I'm talking, uh, yeah, I suppose so

Q. Your are frightened of going to the electric chair, aren't you?

A. Scared to death.

Q. Jake, how long had you been drinking before you got involved in this thing?

A. Um, off and on during the day.

Q. Had you had any narcotics?

A. No.

Q. Any sort of marijuana or anything

other than alcoholic beverages?

A. No.

Q. How much alcoholic beverages had you drunk?

A. That's hard to say.

Q. Well, kind of work on it a little bit, see what you can come up with. It hasn't been too hard for you to say a lot of other things.

MR. CAMPBELL: Your Honor--

A. I'm thinking.

THE COURT: Mr. Haddock, don't do that.

A. Maybe a case before I met up with him.

Q. A case of what?

A. Maybe three or four six-packs.

Q. Four would be twenty, twenty-four beers, is that correct?

A. I suppose.

Q. Were your drinking short beers of

long ones?

A. Short.

Q. Were you drunk?

A. I was feeling all right.

Q. How come you said in your deposition you were trying to decide whether you were going to get out and puke if you were feeling all right?

A. Well, you know, pretty gross scene is going on.

Q. The alcohol didn't have anything to do with it?

A. Not very much.

Q. Did you drink, you said something about you may have had some whiskey during this time, I believe, whatever kind of testimony it was you gave to the state?

A. Right.

Q. So you mixed whiskey with possibly 24 beers in the course of the day?

A. Yes.

Q. You are just clear-headed as you can be, you remember everything that went on?

A. Pretty much so.

Q. Are you an alcoholic?

A. I don't know.

Q. You drink 24 beers everyday?

A. Sometimes more.

Q. Sometimes more?

A. Yeah.

Q. How much do you weigh?

A. How much do I weigh?

Q. Yes sir.

A. About 150.

Q. 150?

A. I guess about.

Q. You don't know?

A. Not really, sir.

Q. So you are in a position now-- let me see if I have got this straight--of having given testimony against Mr. Smith with the promise from the state that if you did so you, who admit that you were involved in crimes, will get sentence of from 25 years to life?

MR. CAMPBELL: Your Honor, I don't think that is the correct statement of the situation. I don't think the state promised him a thing.

THE COURT: You will have the opportunity to ask questions on redirect.

MR. HADDOCK: Thank you, Your Honor.

MR. CAMPBELL: All right.

MR. HADDOCK: Will you reread him the question to make sure he got it?

[The reporter read back the previous question.]

A. It's not 25 to life. It's a life sentence, whereas on first degree murder I have to do at least 25 years before I am eligible for parole is the type of life sentence I will be receiving. And if I don't get off then, between now and then, the next 25 years I plan on making parole.

Q. Was there additional promises that these sentences would be together instead of one after the othr?

A. Concurrently, yes.

Q. In other words, you would get a concurrent sentence, only one life sentence?

A. Yes sir.

Q. Any other witnesses other than you and Birdman and Smith?

A. Not that I know of, no.

Q. So there is just you now and Smith?

A. Right.

Q. That's the way it is, isn't it?

A. Right.

Q. And you got 25 years if you behaved yourself, and we don't know what Smith has got, is that right?

A. Right.

MR. HADDOCK: That's all, Your Honor. No further inquiry.

EXAMINATION BY MR. CAMPBELL:

Q. Mr. Johnson, you have, have pled no defense to--Mr. Haddock asked you how many crimes you have confessed to and you said three. You have pled no defense to each of those three crimes?

THE COURT: Mr. Campbell, may I see you and Mr. Haddock:? [The following conference was held at the bench outside the hearing of the jury:]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DENNIS WAYNE SMITH,

Plaintiff,

v. CASE NO. 83-136 CIV-T-10

LOUIE L. WAINWRIGHT,

Defendant.

MEMORANDUM OPINION

This is a habeas corpus proceeding pursuant to 28 USC §2254 brought by a state prisoner under sentence of death. Execution was most recently scheduled to be carried out on February 15, 1983. This petition was filed on February 9 and, of necessity, I granted a stay on February 14 in order that the Petitioner's many claims might be considered. The complete record has now been compiled and the parties have fully briefed their respective positions.

FACTS SURROUNDING THE OFFENSE

John Mitchell Arnsdorff was murdered in Polk County, Florida, on July 29, 1975. According to the testimony of Wesley Johnson the murder was perpetrated by the Petitioner, Dennis Wayne Smith, aided and abetted by Johnson and a third accomplice named Wagner.

Smith was indicted on August 29, 1975, and charged with first degree murder. He entered a plea of not guilty and the case proceeded to trial on March 23-26, 1976. Prior to the start of petitioner's trial, Johnson pled nolo contendere to the Arnsdorff murder as well as two other homicides. He was later given concurrent life sentences in each case in exchange for his testimony against Smith.

Johnson testified that he, Smith and Wagner met at a bar and decided to rob a homosexual in order to obtain money for beer. The three then went to another bar where they met the victim, Mitchell Arnsdorff. On the pretext of giving a party, they invited Arnsdorff to the place where Johnson was living. The four men drank beer for a short while and then Johnson grabbed the victim while Wagner threatened him with an ice pick. While Arnsdorff was restrained Smith took Arnsdorff's wallet, in which there was $6.00, and one of the three removed his wrist watch. They then forced Arnsdorff into the trunk of his own car, intending to abandon him in a remote spot. Wagner and Johnson, in Arnsdorff's car, were following Smith in his car when they ran into a bridge abutment, flattening a tire. After an unsuccesful attempt to repair the tire, the two cars proceeded until the disabled Arnsdorff vehicle became stuck in the sand. One of the three men then opened the trunk of the car and Smith hit Arnsdorff with a tire tool while Wagner began to stab him with the ice pick. Believing Arnsdorff to be dead, they closed the trunk and left the scene to go to a gas station. Smith told Wagner to get some gas, which he did. They then returned to Arnsdorff's car and, at Smith's direction, Johnson doused it with gas and set it afire.*

At this point in Johnson's narration, the court excused the jury to allow the defense to renew a pre-trial motion to exclude testimony of a second murder committed by Petitioner and Johnson. The court denied the motion, as it had previously, on the ground that the second murder was part of a single transaction and therefore, relevant to the Arnsdorff murder.

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* Dr. James L. Holoman, a pathologist and medical examiner testified earlier that Arnsdorff died from incineraton or asphyxiation from smoke caused by the fire.

Johnson then testified that after burning the Arnsdorff car he, Smith and Wagner immediately went to a swimming hole. An argumment about the division of the $6.00 and the watch ensued between Smith and Wagner. Smith told Johnson to grab Wagner, and while Johnson held him, Smith stabbed Wagner with the ice pick. At Smith's direction Johnson pulled Wagner into the swimming hole and held him under water to ensure his death. Afterward they transported Wagner's body elsewhere and buried it.

Smith testified in his own defense. He admitted that he was in the company of Wagner and Johnson on the night of the murder, but claimed that the robbery was their idea. Although he acknowledged accompanying them to the second bar and that he left it with them and the victim, he testified that they drove him straight from the bar to his apartment because he was too intoxicated by beer and drugs to do anything but sleep. According to Smith, that was the last he saw of them that night. No evidence was introduced by the defense to corroborate the alibi.*

HISTORY OF THE CASE

Petitioner was found guilty as charged and a sentence of death was imposed by the Court in accordance with the jury's recommendation. On appeal to the Florida Supreme Court Petitioner raised two issues: (1) the admissibility of Johnson's testimony during the guilt phase of the trial concerning the second homicide (the murder of Wagner) committed subsequent to the Arnsdorff murder; and (2) the imposition of the death penalty upon the Petitioner when an accomplice (Johnson) who had pleaded nolo contendere to three murders, received concurrent life sentences in return for his testimony. The Florida Supreme Court affirmed Petitioner's conviction and sentence of death on November 9, 1978. Smith v. State, 365 So.2d 704 (Fla. 1978). Petitioner then sought review by certiorari from the Supreme Court of the United States, but the petition was denied on October 1, 1979. Smith v. Florida, 444 US. 885, 100 S.Ct. 177 (1979).

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* It should also be noted that the state had earlier introduced evidence of Petitioner's footprints being found at the scene of the crime.

After the Florida Cabinet denied his

request for clemency, and after he was originally scheduled to be executed on June 3, 1981, Smith filed in the state trial court a motion to vacate his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. He asserted, as he does in this proceeding, a large number of claims including an alleged Brady violation.*

The trial court concluded that the majority of Smith's claims were not appropriate in a post-conviction proceeding brought under Florida Rule of Criminal Procedure 3.850 and it denied the motion without an evidentiary hearing.

Smith appealed to the Supreme Court of Florida, and also filed a petition for habeas corpus and a petition for leave to apply for a writ of error coram nobis. A stay of execution was granted pending disposition of those proceedings. Except for the alleged Brady violation, the Supreme Court affirmed the trial court's denial of post-conviction relief, denied habeas corpus and denied the petition for writ of error coram nobis. The case was then remanded to the trial court to hold an evidentiary hearing on the claimed Brady violation. Smith v. State, 400 So.2d 956 (Fla. 1981)

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* Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

After the remand and following an evidentiary hearing, the trial court again denied Smith's motion for post-conviction relief and the Supreme Court affirmed on appeal. Smith v. State, 421 So.2d 146 (Fla. 1982).

On January 20, 1983, the Governor signed a second death warrant ordering the execution of the Petitioner between noon on February 11, 1983 and noon on February 18, 1983. Execution was scheduled for February 15, 1983. On February 9, 1983, Smith filed the present petition for federal habeas corpus relief, and a motion for stay of execution; and a stay was granted on February 14 pending consideration of the Petitioner's many claims. The Petition asserts nineteen separate contentions, each of which will be considered in turn*

I

The Petitioner's first claim is that his conviction violates his right to due process under the Fifth and Fourteenth

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* The state does not suggest that any of Petitioner's claims are unexhausted insofar as available state remedies are concerned.

Amendment;* his right to the effective assistance of counsel under the Sixth Amendment; and his right to regularity in the imposition of capital punishment under the Eighth Amendment, all because the principal witness against him (Wesley Johnson) has since recanted his testimony and the recantation constitutes "newly discoverd evidence" requiring a new trial.

It appears, factually and more specifically, that since the Petitioner's trial Wesley Johnson has signed an affidavit and has authored other written statements and letters explicitly recanting his trial testimony and exculpating the Petitioner by assuming to himself sole responsibility for the Arnsdorff and Wagner murders.

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* Since all of petitioner's claims are derived through the Fourteenth Amendment, repetitious citation of that Amendment will be avoided.

Under the law of Florida the procedural mechanism to be pursued in seeking a new trial on the ground of newly discovered evidence, after a conviction has been affirmed on appeal, is to apply to the appellate court for leave to petition the trial court for a writ of error coram nobis. Hallman v. State, 371 So.2d 482 (Fla. 1979). It must be shown, among other things, that the new evidence concerns facts not previously known and that, had they been known at trial, they conclusively would have prevented the entry of judgment. Ibid.

Thus, in this instance, as a part of his post-conviction proceedings in the state courts, Petitioner has previously sought permission from the Supreme Court of Florida to pursue this claim by writ of error coram nobis, but permission was denied. Smith v. State, 400 So.2d 956, 960 - 962 (Fla. 19881). In essence, the Florida court held that the facts (i.e., Johnson's exculpation of the Petitioner) were not new in the sense that Johnson had made a similar statement exculpating the Petitioner before the trial; that the resulting inconsistency between his pretrial statement and his testimony at trial was made known to the jury during Petitioner's trial; and, accordingly, the Court determined that it could not be conclusively stated that the result of the trial would have been precluded by the "newly discovered evidence" in the form of a post trial recantation.

In his Petition and supporting brief in this Court the Petitioner argues only that Johnson's pretrial statements exculpating the Petitioner were unsworn while his post trial recantation was under oath; but no authority is cited to demonstrate that this is a meaningful difference in the context of evaluating "newly discovered evidence" as an asserted basis for a new trial. Neither does the Petitioner cite any authority for his ultimate claim that Johnson's post trial recantation somehow implicated his federal constitutional rights; and it should be noted in that respect that the approach taken by the Supreme Court of Florida in evaluating a witness's recantation as newly discovered evidence is perfectly consistent with the law of the Eleventh Circuit in passing upon similar claims in the federal system. It is clearly established federal law that recantations are "looked upon with the utmost suspicion" and that a new trial should be granted only when the Court is satisfied both that the trial testimony was false and that a different result might have been reached without it. United States v. Smith, 433 F.2d 149 (5th Cir. 1970).

The Petitioner's first claim fails to demonstrate any deprivation of rights having constitutional significance.

II

Petitioner's second claim is that he was denied his right to due process of law under the Fifth Amendment because the prosecution used coerced testimony at his trial. The contention is that Wesley Johnson's trial testimony was coerced because he confessed and agreed to testify against the Petitioner only because of his own fear of the death penalty.

No authority is cited for the proposition that the threat of a death penalty, and an agreement to testify in order to avoid it, is somehow coercive as a matter of law with the result that such testimony is incompetent or unusuable. Indeed, analogous authority is to the contrary. See Chaney v. Wainwright, 561 F.2d 1129 (5th Cir. 1977), and United States v. Ballard, 586 F.2d 1060 (5th Cir. 1978), holding that confessions are not rendered involuntary and inadmissible because of fear of the maximum legal sanction and a desire to secure more lenient treatment.

Wesley Johnson's plea bargain, and his other motivations for testifying against the Petitioner, were fully explored during his cross examination and were available for the jury's consideration in assessing his credibility as a witness. There was no violation of Petitioner's constitutional rights in the admission of

Johnson's testimony at trial.

Alternatively, as to this claim (and a number of others), the state also asserts that it was waived under the rule of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), due to a lack of objection at trial, a present failure to show any "cause" and "prejudice" relating to the failure to object, and the refusal of the Florida Supreme Court to consider the issue precisely because of its contemporaneous objection and procedural default rule. The Florida Court held (Smith v. State, 400 So.2d 956, 958 (Fla. 1981)):

> Initially, we hold that with the exception of the alleged Brady violation and the challenge of ineffective assistance of trial counsel, Smith's claims are inappropriate to a proceeding under rule 3.850. The remaining allegations, except his claims of ineffective assistance of appellate counsel and alleged improper consideration by use of a

> psychological report, were matters which were or could have been raised and disposed of on direct appeal and are not proper subject matters for a post-conviction motion. Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Witt v. State, 387 So.2d 922 (Fla.), cert. denied, __ U.S. __, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). The trial court, therefore, properly refused to consider these allegations.

Thus, even if it had been determined that the Petitioner's constitutional rights had been infringed, the state correctly contends that the claim could not be considered.

The Petitioner's third claim is that he was denied his right to due process of law under the Fifth Amendment; his right to effective assistance of counsel under the Sixth Amendment; and his right to regularity in the imposition of capital punishment under the Eighth Amendment when the Supreme Court of Florida refused to consider the newly discovered evidence in the form of Johnson's post trial recantations.

This claim is intertwined with, and dependent upon, the Petitioner's first claim. Having already decided that claim adversely to the Petitioner's position, it follows that this claim is also without merit for the same reasons previously stated.

IV

The Petitioner's fourth claim is that he was denied his right to due process of law under the Fifth Amendment; his right to the effective assistance of counsel under the Sixth Amendment; and his right to regularity in the imposition of capital punishment under the Eighth Amendment because the prosecution withheld exculpatory evidence at trial contrary to its obligations under Brady v. Maryland, 373 U.S. 83 S.Ct. 1194 (1963).

The essence of this contention is that the prosecution did not disclose or produce certain pretrial statements made by Johnson and his wife to investigating police officers, and that those statements were exculpatory because they made no reference to the Petitioner or were otherwise inconsistent and could have been useful for purposes of impeachment at trial.*

When this claim was initially asserted in the state trial court as a part of the Petitioner's post conviction proceeding under Rule 3.850 of the Florida Rules of Criminal Procedure, that court refused to consider the claim as inappropriately raised in that context. On appeal, the Supreme Court of Florida reversed that holding and remanded for an evidentiary hearing on the Brady issues. Smith v. State, 400 So.2d 956 (Fla. 1981).

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* These statements are more specifically described in the opinion of the Florida Supreme Court, 400 So.2d 963, f.n.1.

On remand, an evidentiary hearing was held before the trial court on August 4, 1981. The Petitioner was in attendance and was represented by counsel. His attorney at trial was not present, having moved out of the state; but the record of the hearing reveals that Petitioner's new lawyers had previously conferred with trial counsel by telephone. The hearing proceeded and the state offered testimony by the prosecutor at trial that he had practiced open file discovery in preparing for the Smith trial; that he had disclosed his entire file to defense counsel (even to the point of making a duplicate file for his use); and that each of the disputed statements had been in that file. No contrary evidence was offered by the Petitioner.

After the hearing the trial judge entered a written order denying relief and stating in part as follow:

> The conclusion is inescapable that the State provided all of the exhibits to the defendant, or made the defense aware of the existence of these exhibits. There is absolutely no basis for finding otherwise. Since the undersigned judge is convinced that these exhibits were either made available to the defendant, or the defendant was made aware of their existence, it is not necessary to determine the value to his defense.
>
> In any event, it is the belief of this court that none of the statements were favorable to the defendant. Even the first statement by Wesley Irving Johnson was a clear indication that some unnamed person participated

> in the subject crimes. It was "childs play" police work to make the association which implicated the Defendant, Dennis Wayne Smith.

This conclusion was thoroughly reviewed on appeal by the Supreme Court of Florida and was affirmed. Smith v. State, 421 So.2d 146 (Fla. 1982).

Accordingly, the state now contends that the Petitioner has received a full and fair hearing of these issues in the state courts and that this Court is bound to give a presumption of correctness to the state court's findings under those circumstances pursuant to 28 USC §2254(d) and Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981).

The Petitioner responds by narrowing the claims made in his petition and now asserts that, although he was afforded a hearing, "said hearing did not comply with the requirements of 28 USC §2254[d](2), (3), (6), (7), and (8)." Petitioner's Supplemental Memorandum, p. 8. Three arguments are advanced: first, that the trial court's findings are not supported by the record; second, that the failure of his counsel at that hearing to secure the presence of his trial counsel as a witness prevented adequate development of the material facts; and, third, that the trial court may have prejudged the issues.

The first and third of these contentions are simply without merit. The record does support the findings of the trial judge, and the suggestion that the court prejudged the issue is, at best, frivolous speculation. Indeed, the record of the evidentiary hearing reveals painstaking consideration. The second argument also fails because, among other things, there is simply no current allegation or showing that the presence of Petitioner's trial counsel at the hearing would have contributed anything of value. In fact, Petitioner's then counsel reported to the Court during the hearing that he had spoken to trial counsel by telephone, and trial counsel simply had no recollection of the matters in the issue.

A full and fair hearing was conducted, the trial Court's findings are amply supported by the record and are presumptively correct. No further proceedings are warranted in this Court on that issue. Sumner v. Mata, supra.

The Petitioner's fifth claim is that he was denied his right to due process of law under the Fifth Amendment because of the use of "inflammatory inadmissible evidence of separate murder" at his trial.*

This contention relates to Johnson's testimony concerning the murder of Wagner, and it restates the issue which became the focal point of Petitioner's direct appeal to the Supreme Court of Florida following his conviction. See Smith v. State, 365 So.2d 704, 706 - 707 (1978). The Florida Court held, applying its own pertinent precedents in Williams v. State, 110 So.2d 654 (Fla. 1959) and Ashley v. State, 265 So.2d 685 (Fla. 1972), that the evidence of the Wagner homicide was properly admitted as part of a single transaction which spanned the night of, and included, Arnsdorff's murder. As such, the Court, concluded, the evidence concerning the second murder was relevant to place Smith at the scene of the first since it established that he was with the people involved in the first homicide just an hour after it took place.

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* Petitioner's brief expands this claim to assert an Eighth Amendment violation as well.

Whether this evidentiary determination was correct or incorrect is a fairly debatable question. Indeed, the Supreme Court of Florida divided four to three on the issue with the three dissenting justices expressing the view that the probative value of the evidence was outweighed by its prejudice. If the issue had arisen in the federal system, governed by Rules 403 and 404(b), F.R.E., it would be an equally troublesome point as to which this Court or the Court of Appeals might (or might not) reach a result contrary to that reached by the state courts. See United States v. Beechum, 582 F.2d 898, 909 - 916

(5th Cir. 1978) (en banc).

The important point here, however, is the principle that the federal courts cannot be concerned with the mere propriety or impropriety of state evidentiary rules or their applicaton in individual cases. A state's interpretation and application of its own law or rules is no basis for habeas corpus relief since no federal constitutional issue is presented. See e.g., Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981); Monk v. Blackburn, 605 F.2d 837 (5th Cir. 1979); Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977); Hall v. Wainwright, 493 F.2d 37 (5th Cir. 1974). Absent a showing of fundamental unfairness amounting to a denial of substantive due process of law, even a misapplicaton of a state rule or law is not reviewable by way of federal habeas corpus.

Forbes v. Estelle, 559 F.2d 967 (5th Cir. 1977); Starling v. Estelle, 651 F.2d 1082 (5th Cir. 1981).

The Petitioner argues that the evidentiary ruling of which he complains in this instance amounted to a deprivation of due process, but neither a reading of the record or the citation of any established authority supports that conclusion. No issue of constitutional dimension is presented by this claim.

VI.

The Petitioner's sixth claim is that the prosecution during his trial commented upon his custodial silence in violation of his Fifth Amendment rights.

It appears that, following his arrest, the Petitioner made a statement to interrogating officers but did not tell them (as he testified at trial) that he had loaned his car to Johnson on the night of the Arnsdorff murder. The prosecutor cross examined him concerning that inconsistency or omission.

The disposition of the claim of a Fifth Amendment violation on these facts is squarely governed by Lofton v. Wainwright, 620 F.2d 74 (5th Cir. 1980), distinguishing Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976). There is no merit to Petitioner's contention.*

VII.

The Petitioner's seventh claim is that he was denied his right to due process of law under the Fifth Amendment and his right to confront the witnesses and have effective assistance of counsel under the Sixth Amendment because a witness for the state, not shown on the state's pretrial list of witnesses,* was permitted to testify; and further, that this circumstance also violated the rule of sequestration because the disputed witness had previously been in the courtroom for a portion of the trial proceedings.

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* The State also contends that there was a Wainwright v. Sykes waiver regarding this claim (see page 10, supra), and the State is correct.

During the state's rebuttal case at trial the prosecutor announced his intention to call as a witness Patricia Johnson, the wife of Wesley Johnson. His stated purpose, in view of the cross examination of Wesley Johnson, was to have her testify concerning prior consistent statements made by Johnson. Compare Rule 801 (d)(1)(B), F.R.E. The prosecutor explained that he had not listed her as a witness because he had not anticipated that her testimony would become admissible or necessary. He also drew attention to the fact that she had been in the courtroom during an earlier portion of the trial, but argued that she was not in violation of the rule of sequestration precisely because she was not then a contemplated witness. The trial judge entertained a proffer of her testimony in question and answer form out of the presence of the jury, and then overruled the defense objections, permitting her to testify.

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* Rule 3.220(a)(1)(i) of the Florida Rules of Criminal Procedure, unlike Rule 16, F. R. Crim. P., requires the state to furnish on demand a list of witnesses.

There was simply no error in this procedure, much less error of constitutional magnitude; and, even if there had been some mistake in the interpretation or application of state procedural or evidentiary rules, no relief is available in this Court in a collateral proceeding under 28 USC §2254. See authorities cited, _supra_, page 16. Furthermore, as to this claim also, the State correctly asserts a _Wainwright v. Sykes_ waiver because the point was not preserved on appeal to the Supreme Court of Florida. _See_, _Ford v. Strickland_, 696 F.2d 804, 816 - 817 (11th Cir. 1983) (_en banc_).

VIII

The petitioner's eighth claim is that he was denied his right to due process of law and a fair and impartial trial under the Fifth Amendment because the trial judge gave an informal "Allen Charge" to the jury.

The petition alleges, more specifically that as the jury was about to retire at 4:55 p.m. to commence deliberations the trial judge remarked that "if we approach the hour of 7:00 o'clock it's going to be my conclusion you will have to be sequestered for the night." The jury subsequently returned with its verdict at 6:45 p.m., and from this sequence of events it is argued that the verdict was coerced.

A review of the record reveals that the remark of the trial judge as quoted in the petition was taken entirely out of context.

The trial began on March 23, 1976. At the end of the day's proceedings an unreported bench conference was held during which, obviously, one or perhaps both of the parties orally moved the court to sequester the jury. (R 170) The judge then addressed the jury, informing them that a request for an order of sequestration had been made, and stating further (R 171):

> "Now, I have never sequestered a jury during the presentation of testimony. I have often done it when the jury has retired to deliberate, and that might become necessary here, but you have this choice. You may go to your homes for this evening and return in the morning individually if you will do as you are told, or you can be housed together at local accommodations under security."
>
> (emphasis supplied)

The judge then proceeded to instruct the jury in forceful terms concerning their duty to avoid improper communications, and extracted individual pledges of fidelity in lieu of sequestration. (R 173)

The following day, March 24, lunch was provided for the jury in the jury room (R 728); but the judge said (R 279):

> "However, because of the monotony, it is anticipate [sic] that should we be together at the noon hour tomorrow we will make arrangements for you to have lunch together in sequestration at the restaurant."

The next and last day of the guilt phase of the trial, March 25, the Court explained to the jury at some length that a "sequestered lunch" would be provided at a local restaurant (R 486 - 487); and he concluded his explanation with the declaration and order: "You are sequestered, which means you will remain apart from everyone." (R 487) Later that afternoon, after the summations of counsel and the delivery of his charge, the judge said (R 629 - 630):

> THE COURT: All right. You will also take the instructions just read.
>
> You may retire, elect your foreman who will preside over your deliberations and sign a single form of verdict after you have arrived at your verdict.
>
> Informally, I have advised -- what did you find, Sergeant Moor?
>
> THE BAILIFF: I have two blocks of rooms.

> THE COURT: All right, we will see how it goes. If we haven't gotten a verdict -- understand, your deliberations are what you want to do. No one controls you, but arrangements have to be made, and I think you would be more comfortable knowing what our plans are so that you might communicate with your family; but if we approach the hour of 7:00 o'clock it's going to be my conclusion you will have to be sequestered for the night.
>
> You will be permitted to use the telephone and, and assuming that you need help that you can't get from a family member, the bailiff will assist you.

Clearly, given the total context in which it was made, the judge's remark -- "if we approach the hour of 7:00 o'clock it's going to be my conclusion you will have to be sequestered for the night" -- was merely intended to inform the jury of his plans and their status in order that they might communicate with their families; and the suggestion that such remark was coercive or otherwise rendered the trial so fundamentally unfair as to deprive the Petitioner of constitutional due process is utterly without merit.*

IX

The Petitioner's ninth claim is that his Fifth Amendment privilege against self incrimination was infringed, and his Sixth Amendment right to effective assistance of counsel was denied, because a court appointed psychiatrist was permitted to testify concerning his interview with the Petitioner and statements made by the Petitioner during that interview.

During the pretrial stages of the case Petitioner's trial counsel, pursuant to Rule 3.210(a), (b) and (c), Florida

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* Alternatively, the state's assertion of a Wainwright v. Sykes, waiver as to this claim is also correct.

Rules of Criminal Procedure, filed a formal notice of intent to rely upon the defense of insanity. (R 5)* Subsequently, he also filed pursuant to the same rule (as did the state) a written motion suggesting insanity and requesting that the court appoint not more than three disinterested experts to conduct an examination and determine the Petitioner's competency both at the time of the offense as well as the time of trial. (R 18; 20) In response to those motions, by order entered October 27, 1975 (R 21), the court appointed the staff of the Mental Health Center of Polk County; and, in accordance with that order, the Petitioner was examined on two occasions in November by Dr.

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* Compare Rule 12.2, F. R. Cr. P. requiring the filing of a similar notice in the federal system.

Bert Kaplan, a clinical psychologist who was the Director of the Forensic Unit of Mental Health Center. (R 719 - 721)

In the meantime, the Petitioner's trial counsel also engaged a psychiatrist, Dr. Joseph K. Niswonger. (R 480; 495) who examined the Petitioner on December 29, 1975, and January 7, 1976. (R 507)* Then, on March 22, 1976, immediately prior to the scheduled trial date, the court conducted a sanity hearing at the request of Petitioner's counsel; and, during that hearing, the Petitioner filed and offered in evidence the written reports that had been made by both Dr. Kaplan and Dr. Niswonger. (R 31; 489 - 505). The court found the Petitioner competent to stand trial and the case proceeded.

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* It will be assumed, as asserted in the petition, that the Petitioner was not given any Miranda warnings during any of his psychological or psychiatric examinations.

At trial, during the rebuttal phase of the state's case, the prosecutor called Dr. Niswonger as a fact witness (R 478 et. seq.) to have him testify (in accordance with his written report) that the Petitioner had claimed amnesia during his interviews with him, the claim of amnesia or lack of memory being inconsistent with Petitioner's testimony given in his own defense at the trial.

Accordingly, the assertion now made in the petition in this court that the state was permitted to call a "court appointed" psychiatrist, and that Petitioner's Fifth Amendment rights were compromised in the process, is a gross distortion of the record. Dr. Niswonger was not court appointed; he was privately engaged by the Petitioner through his trial counsel, and was listed as a witness for the defense. (R 480) There were no Fifth Amendment implications; and the question whether the communications between Petitioner and the doctor were privileged in nature under state law was carefully sorted out by the trial judge who correctly ruled that the privilege, if any, had been waived when the Petitioner offered Dr. Niswonger's report in evidence at the sanity hearing. (R 595)

If the state had called as a witness Dr. Kaplan,* the court appointed expert, when the Petitioner had not offered evidence in support of his insanity defense at trial, relief might well be warranted on the basis of Battie v. Estelle, 655 F.2d 692, 702 - 703 (5th Cir. 1981), extending the holding of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), even to situations in which appointment of the court appointed examiner is initially sought by the defendant himself. But those authorities obviously have no application to conversations between a defendant and a privately retained expert as to which no element of state compulsion is involved. The Petitioner's ninth claim is wholly without merit.

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* The Petitioner called Dr. Kaplan as a witness during the penalty phase of the trial (R 719); and the petition also complains that his cross examination by the state offended Estelle v. Smith, but that decision is clearly inapposite to any case in which the witness is called by the defendant himself.

Alternatively, the State correctly contends that this claim was also waived under Wainwright v. Sykes, due to a failure to present and preserve the point on direct appeal.

X

The Petitioner's tenth claim is that he was denied due process of law under the Fifth Amendment and his right to regularity in the imposition of capital punishment under the Eighth Amendment because he " . . . was sentenced pursuant to a statute which allows unbridled prosecutorial discretion in making the decision to prosecute for capital offenses or to enter plea arrangements for non-capital offenses" (Petition, page 26).

Any otherwise colorable arguments which might be advanced in support of this claim are foreclosed by the Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).

XI

The Petitioner's eleventh claim is that he was denied due process of law and equal protection of the law under the

Fifth Amendment, and his right to regularity of capital sentencing under the Eighth Amendment, because the death penalty has historically been discriminatorily applied.

This claim is also foreclosed by Proffitt v. Florida, supra, and Spinkellink v. Wainwright, 578 F.2d 592 (5th Cir. 1978).

XII

The Petitioner's twelfth claim is that he was denied due process and equal protection of the law under the Fifth Amendment, and regularity of capital sentencing under the Eighth Amendment, because his co-offender, Wesley Johnson, was allowed to plead guilty in exchange for a life sentence.

The petition and supporting brief argue at length that Johnson was even more culpable in the Arnsdorff murder than was Smith, and that the Petitioner's sentence of death was therefore disparate and arbitrary. In urging this contention, however, the Petitioner does nothing more than challenge factual findings made by the Supreme Court of Florida. On Petitioner's direct appeal (Smith v. State, 365 So.2d 704, 708 (Fla. 1978)), the Court held:

> Since Johnson did not receive a death sentence, Smith argues that the death sentence was improperly imposed upon him. He relies upon this Court's decision in Slater v. State, 316 So.2d 539 (Fla. 1975), in support of his position.
>
> We find that this case is not controlled by Slater, wherein the 'trigger man' received a life sentence while Slater, an accomplice who did not have the murder weapon in his hand, received the death penalty. We reduced Slater's sentence to life. As evidenced by the record and the express findings of the trial judge, Smith's

> culpability in the murder of Arnsdorff was much greater than that of Johnson. Smith originated the idea and directed Johnson to pour gasoline on the vehicle containing Arnsdorff and to ignite the vehicle. The record in no way suggests that Smith was acting under Johnson's domination. To the contrary, Johnson was dominated by Smith on this particular evening. We find that, under the peculiar circumstances of this case, the disparity in sentences between Smith and Johnson is justifiable and is neither unreasonable nor capricious.

These findings by both the trial court and the Supreme Court of Florida were not "so unprincipled or arbitrary as to somehow violate the United States Constitution." Barclay v. Florida, __ U.S. __, 103 S.Ct. 3418, 3423 (1983). On the contrary, they are supported by the record and are not now subject to relitigation under 28 U.S.C. §2254(d). Sumner v. Mata, *supra*.

XIII

The Petitioner's thirteenth claim is that he was denied due process of law under the Fifth Amendment, his right to effective assistance of counsel under the Sixth Amendment, and his right to regularity in capital sentencing under the Eighth Amendment because evidence of non-statutory aggravating circumstances was admitted during the penalty phase of his trial.

Florida Statute 921.141(1)(1975), as it existed at the time of Petitioner's trial, previously determined to be constitutional in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), provided in part as follows:

> In the [penalty phase of a capital felony trial] evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the

> aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received regardless of its admissiblity under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida.

Pursuant to that provision, and during the penalty stage of the trial after the Petitioner had been found guilty by the jury, the state offered the testimony of two probation officers and a police detective. Petitioner's trial counsel objected (R 685 - 686) on the ground that the testimony did not relate to any of the statutory aggravating circumstances enumerated in Florida Statute 921.141(5) (1975). The trial court overruled the objection in view of the liberality of the statute regarding the admission of evidence (R 686 - 687), and the testimony was presented.

The essence of the testimony of the two probation officers was that the Petitioner was on probation for an offense involving the sale of marijuana; that he had not been a satisfactory probationer in several respects; and that, in fact, he had violated the terms and condition of his probation. The police detective testified to hearsay information that the Petitioner was involved in the practice of santanism.

Despite the admission of this testimony, none of which was directly germane to any of the statutory aggravating circumstances,* the trial court properly instructed the jury that "aggravating circumstances are limited by statute to the following" etc. (R 755, emphasis supplied).

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* As to aggravating circumstances, Florida Statute 921.141 (5) (1975) provided:

> (5) AGGRAVATING CIRCUMSTANCES--Aggravating circumstances shall be limited to the following:
>
> (a) The capital felony was committed by a person under sentence of imprisonment.
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) The defendant knowingly created a great risk of death to many persons.
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

The jury returned its advisory verdict recommending the death penalty. (R 761 - 762). On the next day the trial judge, as the ultimate sentencer under the Florida statutory scheme, entered his written findings required by Section 921.141(3) "weighing the aggravating and mitigating circumstances." (R 788 - 790)

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

Although the judge remarked in the preamble to his statutorily structured findings that "the defendant is a dangerous person" (R 788), he actually found only one statutory aggravating circumstance -- that the Petitioner's offense was especially heinous, atrocious and cruel. He explicitly found that "no mitigating circumstance of any substance was produced" (R 789);* and he therefore concluded

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*As to mitigating circumstances, Florida Statute 921.141(6) (1975) provided:

> (6) MITIGATING CIRCUMSTANCES -- Mitigating circumstances shall be the following:
>
> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct

that the statutory aggravating circumstance outweighed any mitigating circumstances, statutory or otherwise, thus requiring that the death penalty be imposed. (R 789 - 790).

The Petitioner's argument concerning the admission of the disputed testimony is based upon Proffitt v. Wainwright, 685

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or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

(g) The age of the defendant at the time of the crime.

F.2d 1227, 1266 (11th Cir. 1982). See also Goode v. Wainwright, 704 F.2d 593, 603 (11th Cir. 1983). In Proffitt and in Goode, both involving the Florida sentencing scheme, the Court held that reliance upon a non-statutory aggravating circumstance by the sentencing judge violated the Eighth and Fourteenth Amendments even though other, valid aggravating factors were found to exist and no mitigating circumstances were present so as to require the balancing of exercise contemplated by the Florida Statute. This holding has since been undermined, however, by the more recent Supreme Court decision to the contrary in Barclay v. Florida, __ U.S. __, 103 S.Ct. 2733 (1983). See also, Zant v. Stephens, __ U.S. __, 103 S.Ct. 2733 (1983).

In Barclay and Zant the Supreme Court

held that consideration of non-statutory or invalid aggravating factors by the ultimate sentencing authority (the Georgia jury in *Zant* and the Florida judge in *Barclay*) did not render the sentence unconstitutional so long as (1) a valid aggravating circumstance was found to exist; (2) the improper factor which was also considered did not itself consist of constitutionally protected activity such as the expression of unpopular political views or the practice of a religion; and (3) there was, in the case of the Florida Statute, no finding of a mitigating circumstance which would require a balancing of aggravating against mitigating factors.

While *Proffitt*, *Goode*, *Barclay* and *Zant* are instructive with respect to the proper analysis to be made of this case, all are distinguishable. In each of those cases the sentencing authority expressly articulated and demonstrably relied upon an invalid or non-statutory aggravating circumstance in imposing sentence. Here the trial court merely admitted some disputed testimony, much of which (consisting of the testimony of the probation officers) was admissible for another purpose anyway, namely, to negate the existence of a mitigating circumstance, i.e., that the defendant had no significant history of prior criminal activity. See Barclay, 103 S.Ct. 3427.

The more troublesome point involves the admission of the testimony concerning Petitioner's alleged indulgence in the practice of satanism which could arguably be a form of protected activity within the First Amendment.* If that testimony was relied upon by the sentencing authority as an aggravating circumstance, then even Barclay and Zant would probably require that relief be granted.

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*See Kennedy v Meacham, 540 F.2d 1057 (10th Cir. 1976).

Citing Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931), the Petitioner argues that when a verdict could have been based upon either a constitutional ground or an unconstitutional ground, and the verdict is silent as to its foundation, it must be set aside because the jury "must have" considered the tainted evidence (Petitioner's brief, page 32). This argument fails, however, because the jury was expressly instructed by the trial judge that in making its decision to recommend or not recommend imposition of the death penalty, the jury was specifically limited to a consideration of the statutory aggravating circumstances and no others. (R 755) In Zant the Court said (103 S.Ct. at 2745):

> One rule derived from the Stromberg case requires that a general verdict must be set aside if the jury was instructed it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested. [Citations omitted] This rule does not require that respondent's death sentence be vacated, because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty. (Emphasis supplied)

Accordingly, even though the jury in this case returned a general verdict (R 761), it had been instructed to consider only the statutory aggravating circumstances and it must be presumed that the jury followed those instructions and found the existence of one of the statutory factors and no others[*] Stromberg has no application; and to the extent that admission of the evidence of satanism was error because it did not relate to a statutory aggravating or mitigating circumstance, Zant teaches that such error simply does not rise to the level of constitutional magnitude. This is especially true in Florida, as distinguished from Georgia, because the jury's verdict was advisory only.

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[*] Indeed, the form of the jury verdict made specific mention of the limitation in the Court's charge:

> "We, the jury, having heard the evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find the advise that the aggravating circumstances do outweigh the mitigating circumstances." (Emphasis supplied.)

It is equally clear that the trial judge as the ultimate sentencing authority did not consider the evidence of satanism in imposing the death penalty. One of the principal thrusts of the Florida Statute, drawn in the wake of Furman v. Georgia,** was to require the trial court to "set forth in writing its findings upon which the sentence of death is based."*** This requirement, in turn, also "requires the

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**408 U.S. 238, 92 S.Ct. 2736 (1972).

***Florida Statute 921.141 (1977).

trial judge to focus on the circumstances of the crime and the character of the individual defendant." Proffitt v. Florida, 428 U.S. at 251, 96 S.Ct. at 2966 (1976). Thus, in his findings in this case, the trial judge restricted himself to the prescribed statutory consideration; he found that the offense was especially heinous, atrocious and cruel, a statutory aggravating circumstance not counterbalanced by any mitigating consideration, statutory or otherwise. No mention was made, and no reliance placed upon, Petitioner's alleged practice of satanism. Accordingly, under Barclay, the sentence was valid even if the admission of the disputed evidence was error. Its mere admission does not rise to the level of constitutional significance.

This claim is without merit; and, here again, the State correctly and alternatively asserts a waiver of the claim in any event under Wainwright v. Sykes, because the point was not preserved on direct appeal and was not thereafter considered to be appropriately raised in the Rule 3.850 proceedings in the state courts.

XIV

The Petitioner's fourteenth claim is that he was denied his Sixth Amendment right to the effective assistance of counsel at his trial.*

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*No evidentiary hearing was held on this issue in the state court although the claim was said to be properly raised, from a procedural standpoint, in a Rule 3.850 proceeding. The Florida Supreme Court affirmed the denial of relief without a hearing after applying the standards it adopted in Knight v. State, 394 So.2d 997 (Fla. 1981), for judging claims of ineffective assistance. Smith v. State, 400 So.2d 956, 959 (Fla. 1981). See also Armstrong v. State, 429 So.2d 287 (Fla.

The petition, as supplemented by the brief, points to the following specific claims of deficiency on the part of his retained lawyer at trial:

(1) Failure to adequately assert an insanity defense;

(2) Failure to depose Wesley Johnson before trial;

(3) Failure to depose the state's other witnesses before trial;

(4) Failure to adduce mitigating evidence during the penalty phase;

(5) Mishandling of the psychiatric testimony during the penalty phase;

(6) Presentation of a meaningless closing argument;

1983), in which the Florida Court adhered to its decision in Knight notwithstanding the Eleventh Circuit's decision in Washington v. Strickland. Knight employs the "Decoster standard" -- proof that the error of counsel affected the outcome -- which was considered and rejected as too harsh in Washington.

> (7) General indecisiveness, presentation of rambling arguments and failure to object to jury instructions.

Each of these assertions will be discussed in the order just stated.

A.

Although his counsel filed a pretrial notice of reliance upon insanity as a defense, the Petitioner's brief complains (at page 34) that " . . . no real insanity defense was in fact mounted on Petitioner's behalf by his privately-retained counsel. Rather, some poorly prepared and ineffective 'stabs' at such a defense may have been made by [counsel] -- but those were totally inadequate."

It is clear from the record that Petitioner's counsel filed the pretrial notice, required by the Florida rule, as a precautionary measure before the Petitioner was actually examined by Drs. Kaplan and Niswonger. When neither expert was prepared to support the defense after their examination (see R 722), the issue was dropped. Moreover, there is no current allegation or showing that Petitioner was in fact insane; and, accordingly, no showing that he was prejudiced when the defense was abandoned. Besides, Petitioner testified at the trial, under oath, that he was not present at the scene of the murder and did not commit the crime.* There is no merit to this claim.

B.

The Florida Rules of Criminal

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*In Washington v. Strickland, 693 F.2d 1243, 1253 (11th Cir. 1983)(en banc), the Court aptly observed that some "lines of defense may be contradictory and thus incapable of being presented persuasively in tandem. For instance, an attorney might not present an alibi defense in conjunction with a justifiable homicide defense."

Procedure, Rule 3.220, unlike the Federal Rules, expressly provide for disclosure of the state's witnesses and the taking of pretrial depositions in criminal cases.

Petitioner complains that his counsel did not depose Wesley Johnson.

At first impression any lawyer would likely suppose that the most rudimentary preparation for a criminal trial would include deposing the state's star witness, given the procedural right to do so, and the fact that it wasn't done in this case presents the petitioner's most serious claim for relief. Upon full consideration of the record, however, I am persuaded that counsel's "failure" may well have been a matter of strategic choice and, in any event, Petitioner has not pointed to any "actual and substantial disadvantage to the course of his defense." Washington

v. Strickland, 693 F.2d 1243, 1262 (11th Cir. 1982) (en banc).

Wesley Johnson was the key witness. On the issue of Petitioner's guilt the other witnesses established or corroborated only so much as the Petitioner was prepared to admit in his own testimony* -- that he was with Johnson and Wagner on the night in question, and that the three of them left the Green Parrot in the company of Arnsdorff. Only Johnson could and did testify that Petitioner remained in their company and, in fact, became the principal actor in Arnsdorff's murder.

These circumstances were as obvious before the trial as they are now, and it was easy to anticipate what Johnson was going to say; he was going to place the Petitioner at the scene and implicate him directly in the act of murder. In fact, defense counsel knew that would be Johnson's testimony because he had a copy of a lengthy statement taken from Johnson in question and answer form after Johnson had plead guilty and had agreed to testify. (Exhibit I to Petition; R 162). The only purpose in deposing Johnson, therefore, would lie in the hope of tying him to a detailed recitation which might later be useful for impeachment at trial as a prior inconsistent statement. But that approach would also entail a substantial risk, namely, the opportunity it would afford the witness to make a prior consistent statement in relation to his anticipated testimony at trial.[*] In evaluating that risk cautious trial counsel would necessarily consider in the first instance whether he already had impeachment material in the form of an inconsistent statement or confession; and, if he did, he might well decide, and deliberately so, to forego the opportunity of a deposition because the prospect of profit would be slim and the potential cost great.

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*Except, perhaps, the testimony of FBI Agent Hegvold concerning the footprints found at the scene of the crime.

That was precisely the position of defense counsel in this case. He was already armed with Johnson's pretrial note to the Petitioner in which Johnson related that "I made sure he heard me talking about how I done it by myself . . . ," and he used that weapon during cross examination and closing argument at trial. (R 148; 152; 575) Counsel also had access to the inconsistent statements made by Johnson to the investigating police officers (see Part IV, pages 11 - 14, supra), and he had and used the question-and-answer statement or deposition Johnson had given after entering his plea. (see R. 155)

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[*] It is significant that the prosecution at trial successfully offered other prior consistent statements made by Johnson to his wife (see Part VII, pages 18 - 19, supra), and it is easy to imagine the glee with which the prosecution would have offered Johnson's sworn deposition, taken by the defense itself, if it had been sought and proved to be consistent.

It was defense counsel's manifest strategy during trial to attack Johnson's credibility primarily on the basis of his plea bargain with the state under which he escaped the death penalty himself in exchange for his plea and his testimony against Smith, with actual imposition of sentence to be withheld until after he had testified. Counsel made that point during his cross examination, together with the fact that Johnson had taken sole responsibility for the crime on another occasion, and he stopped. Other lawyers might have proceeded differently; and, because it has since become known that the jury elected to credit Johnson's testimony anyway, it is easy to suggest through hindsight that perhaps consel *should* have proceeded differently. That is not enough, however, to warrant a finding of constitutional insufficiency in the defense.

Under the circumstances of this case it cannot be said, in the language of *Washington v Strickland*, that counsel failed to investigate a plausible line of defense merely because he elected not to depose Johnson. He had other statements, even a confession by Johnson; and, as previously demonstrated, there was a rational albeit debatable strategic reason for foregoing a deposition in those conditions. Moreover, although Petitioner argues in conclusory terms that "the lack of a defense deposition of that witness in and of itself _must_ constitute ineffective assistance of counsel--or the very term has no meaning" (Petitioner's brief, page 34, emphasis in original), the fact remains that no articulable, "actual and substantial disadvantage" (_Washington v. Strickland_, 693 F.2d at 1262) is ever stated or demonstrated.

C.

The petition asserts (at pages 37 - 38) that not only did his counsel eschew the taking of Johnson's deposition, he did not depose any of the other witnesses either. Again, however, it is never articulated as to precisely how this failure later worked to the Petitioner's "actual and substantial disadvantage." Indeed, as stated earlier, the Petitioner's own testimony at trial disputed only the critical testimony of Johnson concerning the Petitioner's presence and direct participation in Arnsdorff's murder. There was no constitional deprivation here.

D.

The petition asserts that defense counsel failed to develop and present evidence during the penalty phase of the trial concerning four possible statutory mitigating circumstances. (See Petition, pages 38 and 42; Petitioner's brief, page 34). They are: (1) that the capacity of the Petitioner to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (2) that the capital felony was committed while the Petitioner was under the influence of extreme mental or emotional disturbance; (3) that the Petitioner had no significant history of prior criminal activity; and (4) that the Petitioner was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The last of these assertions -- that Petitioner was a mere, less culpable accomplice -- is nothing more than a disputation of Johnson's testimony and is not supported by the record. The Petitioner, after all, had testified that he was not present and did not participate at all.

With respect to the other three areas of mitigation, and despite the assertions to the contrary, the record reveals that defense counsel did in fact present testimony concerning each of them. There was testimony, for example, from both the Petitioner (R 369 - 370; 389 - 391; 397; 412; 419 - 422) and Dr. Kaplan (R 719 - 735) relating to Petitioner's inability to conform his behavior due to use of alcohol and drugs, as well as his mental or emotional disturbance; and, insofar as his limited history of prior criminal activity was concerned, Petitioner had testified (R 373 - 376) to two arrests involving marijuana (one in Illinois and one in Florida), and one extension of probation for fighting.

E.

The petition refers in passing to "mishandling of crucial psychiatric testimony" (Petition, page 38), presumably referring to the calling and examination of Dr. Kaplan by defense counsel during the penalty phase of the trial. Clearly, however, the appropriate object of counsel was to attempt to develop (contrary to Petitioner's preceding claim of ineffective assistance) one of the statutory mitigating circumstances, and it is never demonstrated in any of Petitioner's papers how this aspect of the defense was "mishandled."

The Petitioner asserts that his counsel made a meaningless closing argument at the conclusion of the penalty phase of the trial (Petition, page 39).

Although the argument was brief, consisting of less than two pages in the record (R 753 - 754), and was also somewhat disjointed as reported, it says too much to characterize counsel's allocution as "meaningless." The effect of the presentation was to call attention to the testimony of Dr. Kaplan concerning the

Petitioner's drug abuse and his "significant psychological problems" (R. 722), and to commit him to the mercy of the jury. The approach did not succeed, but it would require the application of purely subjective judgment aided by hindsight to now conclude that it was so poorly conceived and presented as to fall below minimal constitutional requirements. A similar claim was made and rejected in Profitt v. Wainwright, 685 F.2d 1227, 1250 (11th CIr. 1982).

G.

Lastly, the petitioner makes a generalized claim that his counsel was indecisive and, for example, made no relevant objections to jury instructions. (Petition, page 40). No argument is advanced, however, as to which instructions were objectionable or on what grounds; and there is simply no articulation of any "actual and substantial disadvantage" to the defense.

In asserting his various claims of ineffecitve assistance of counsel the Petitioner repeatedly emphasizes that no evidentiary hearing was held in the state courts, and he exhorts the court to conduct one in order to explore the undefined prejudice he claims to have suffered. No useful purpose would be served by doing so. An evidentiary hearing, even in a capital habeas case, is justified and should be conducted only when necessary to resolve sharply defined issues of fact; it should not be conducted merely as a fishing expedition to satisfy the desperate hope of new counsel that something might evolve - something that counsel cannot presently articulate except in the most general and conclusory terms.

No evidentiary hearing is justfied and no relief is warranted with regard to the Petitioner's claim of ineffective assistance of counsel at trial.

XV

In his fifteenth claim the Petitioner asserts that he was denied procedural due process and his right to a fair and impartial trial under the Fifth Amendment, and his right to regular capital sentencing under the Eighth Amendment because the trial judge's instructions to the jury limited the jury's consideration to statutory mitigating factors. In his instructions to the jury on mitigating circumstances the trial judge stated "(m)itigating circumstances by statute are:" and he then read the appropriate statutory language. (R. 756) The court later told the jury:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Florida Statute 921.141(7) of the Florida Statutes. (R. 757, 758).

Significantly, however, the judge then elaborated upon that instruction by making the following statement: "(a)ll evidence of mitigating circumstances may be considered by the judge or jury." (R. 758) In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), the Court reviewed a nearly identical jury instruction and determined "that the jury did not perceive a restriction on the use of any mitigating evidence." Id. at 813.

The record reveals that the judge

read the statute as written* and did not expressly limit the jury's consideration to those mitigating factors enumerated in the statute. The Supreme Court determined in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2965 - 2966, n.8 (1976), that the Florida Statute does not limit a jury's consideration of mitigating circumstances to only those listed in the statute.

In addition, a review of the record reflects that the Petitioner was not limited in the introduction of evidence which might be considered mitigating.**

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*Florida Statute 921.141(5) (1975) provided that "aggravating circumstances shall be limited to the following:" By contrast, subsection (6) began with the declaration "mitigating circumstances shall be the following:"

**Petitioner does not specify what non-statutory mitigating factors the jury should have considered.

The jury heard testimony during the trial concerning Smith's family background, education, work history, social relationships, and psychological history. (R. 370 - 373, 376 - 382, 388, 400)

Furthermore, the trial judge's sentencing order reflects his belief that neither he nor the jury was restricted to a consideration of only statutory mitigating circumstances. The judge stated:

> This Court does not find mitigating circumstances of any substance was produced. This Court can only conclude that sufficient aggravating circumstances exists and that there are not mitigating circumstances to outweigh the aggravating circumstances. (R. 789, 770)

The trial judge's instructions simply did not preclude the jury from considering nonstatutory mitigating factors. Accordingly, the claim is without merit.

Even assuming the jury instructions

were erroneous, the claim would be barred from consideration pursuant to Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct 2497 (1977). The Petitioner failed to make any specific objection at trial or to raise the issue on direct appeal.

In determining whether a procedural default on appeal bars federal habeas review of this issue, the Court in Ford v. Strickland applied the standard of prejudice enunciated in United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584 (1982). Under the Frady test a petitioner must etablish that the error worked to his "actual and substantial disadvantage." Id. at 171.

A review of the evidence proffered at trial which could be construed as nonstatutory mitigating circumstances fails to establish that there was a substantial likelihood that Smith was actually and substantially prejudiced by the judge's instructions to the jury. In the absence of any showing of prejudice to the Petitioner, his failure to assert the issue on direct appeal results in a waiver under Wainwright v. Sykes and Ford v. Strickland.

XVI

Petitioner asserts as his sixteenth claim that he was denied procedural due process under the Fifth Amendment by the failure of the judge or jury to find mitigating circumstances.

After considering all of the evidence presented at trial and during the penalty phase of the proceedings, the trial judge determined that no mitigating circumstances were present, statutory or otherwise. (R. 789) Smith challenges this conclusion contends that several statutory mitigating circumstances are supported by the evidence.

Specifically, he asserts that the following statutory mitigating factors were established:

> (1) The Defendant has no significant history of prior criminal activity.
>
> (2) The captial felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> (3) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
>
> (4) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

With regard to the Petitioner's assertion that the evidence supported a finding that he had no significant history of criminal activity, the record reflects otherwise. The Petitioner testified to two arrests involving marijuana. The first arrest was for posession of marijuana and resulted in incarceration for one year. (R. 374) The second arrest was for the sale of marijuana and the Petitioner was placed on probation for three years. (R. 374) Before the three year term of probation expired, the Petitioner was arrested for fighting and his probation was extended for another year. (R. 375) Petitioner also testified that he was "picked up three or four times for violation of probation." (R. 376)

At the penalty phase, the State offered the testimony of two probation officers who testified that Smith was on probation for the sale of marijuana; that he had not been a satisfacty probationer; and that he had violated the terms and conditions of his probation. (R. 677 - 681, 689, 690)

Taken together, the testimony of Smith and the probation officers would appear to negate rather than support the finding that the Petitioner had no significant history of prior criminal activity The "significance" of that criminal history may be an issue as to which reasonable persons could disagree; but the judge and jury were free to conclude that this mitigating consideration was not supported by the evidence.

The record also fails to support the Petitioner's claim that the judge and jury should have determined that he was merely an accomplice in the crime and that his participation was relatively minor. Wesley Johnson testified that Smith hit

Arnsdorff with a tire tool several times (R. 132), directed Wagner to buy some gas, and told Johnson to set the car containing Arnsdorff on fire. (R. 134) When the Petitioner took the stand he testified that he was not even present when Arnsdorff was killed. (R. 391, 418)

Such evidence either establishes Smith as the ringleader or as a nonparticipant; it fails to support a finding that he was a mere accomplice and only played a minor role in the crime.

Finally, in an effort to establish that at the time of the offense Smith was under the influence of extreme mental or emotional distubance and/or his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, the defense presented the testimony of Smith and a court appointed psychologist, Dr. Kaplan.

During the guilt phase of the trial, Smith testified that on the night in question he was under the influence of drugs and alcohol. (R. 369, 370, 389 - 391, 397, 412, 419 - 422).*

At the penalty phase, Dr. Kaplan testified to the Petitioner's emotional and psychological problems (R. 719 - 739) and the Petitioner took the stand for a second time to testify to his mental condition. (R. 740, 741)

The judge and jury considered the evidence and were not persuaded that the testimony was sufficiently credible to establish the statutory mitigating circumstances. Dr. Kaplan also testified that the Petitioner knew the difference between right and wrong; and, crediting the testimony of Johnson, as the jury obviously did, there was evidence that Petitioner was in full possession of his physical and mental faculties at the time of the offense. The Petitioner does not assert that the judge or jury considered evidence they should not have considered nor does he allege that they failed to consider matters they should have considered. Petitioner merely disputes the weight given to the testimony.

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*Wesley Johnson had testified earlier in the trial that he and Smith consumed a considerable amount of liquor on the evening Arnsdorff was killed. (R. 118, 122, 130, 143).

Consideration of all mitigating circumstances is required by the United States Constitution, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), but the decision of whether a particular mitigating circumstance in sentencing is proved and the weight to be given it rests with the judge and jury.

Petitioner was given ample opportunity to present evidence in mitigation at the trial. The jury and judge considered the evidence and determined that no mitigating factors, statutory or otherwise, were present. Such a decision was well within the domain of the judge and jury and the record fails to reveal any basis to disturb the trial court's findings. The claim is without merit.

XVII

In his seventeenth claim the Petitioner asserts that the Florida Supreme Court received and considered non-record psychiatric reports in reviewing his case in violation of his Fifth Amendment rights to due process of law and to refrain from self incrimination, his Sixth Amendment right to confront witnesses against him and his Eighth Amendment right to regularity in the imposition of the death penalty.

The Florida Supreme Court rejected Smith's argument in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 454 U.S. 1000, 102 S.Ct. 542 (1981); and, more recently, the Eleventh Circuit rejected the same argument in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). Ford controls this issue and in accordance with that en banc decision this claim has no merit.

XVIII

Petitioner asserts as his eighteenth claim that he was denied effective assistance of appellate counsel under the Sixth Amendment. Specifically, Petitioner contends that his appellate counsel erred in not raising the following issues on direct appeal:

(1) Failure by the trial court to instruct the jury that aggravating circumstances must be found beyond a reasonable doubt;

(2) The trial court's instruction to the jury that the death penalty is presumed to be appropriate where the jury finds aggravating circumstances and no mitigating circumstances;

(3) Admission into evidence of two photographs of the decedent's body;

(4) A claim that Section 921.141, Florida Statute (1975), is unconstitutional because it does not require adherence to the Florida Rules of Evidence, particularly as to hearsay and denial of confrontation;

(5) Admission into evidence of the testimony of Dr. Niswonger, which was protected by the psychiatrist-patient privilege;

(6) Admission into evidence of non-statutory aggravating factors during the penalty phase;

(7) Restriction by the trial court of the jury's consideration of non-statutory mitigating circumstances;

(8) Failure to have the jury voir dire transcribed and reviewed by the Florida Supreme Court.

Each of these assertions will be discussed in the order just stated.

To the Petitioner's claim that the appellate counsel failed to assert on appeal the lack of a specific jury instruction that aggravating circumstances must be found beyond a reasonable doubt, the

State responds (1) that no authority is cited in support of the contention that such an instruction is required in the first place;* and (2) that appellate counsel could not have raised the point anyway because the issue was not preserved by trial counsel. Without pausing over those arguments, a review of the trial court's instructions to the jury belie the claim in any event. At the conclusion of the trial, and as a part of his final charge, the trial judge instructed the jury no less than twenty four separate times in various contexts that the State must prove its case beyond a reasonable doubt. (R. 599, 600, 604 - 606, 615, 617, 619, 621, 624, 625, 627). The detailed definition of the "reasonable doubt" concept was stated in the most favorable terms. (R. 613 - 614)

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*The Supreme Court of Florida has held, nevertheless, that aggravating circumstances must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). This is a "settled principle of Florida law." Ford v. Strickland, 696 F.2d 804, 819 (11th Cir. 1983) en banc.

At the conclusion of the penalty phase the judge again instructed the jury. He was not requested and did not reinstruct the jury concerning the state's burden of proof, but did instruct concerning the statutory provisions pertaining to the jury's function to weigh aggravating and mitigating circumstances and to make a sentencing recommendation to the judge.

All of the jury instructions were given on the same day, within a relatively short time of one another. Given the repeated instruction at the close of the guilt phase that the state must prove its case beyond a reasonable doubt and the brief interval between instructions, it is clear that the jury was properly instructed that anything the State contended, including aggravating circumstances, must be proved beyond a reasonable doubt. Appellate counsel cannot be faulted for not raising this issue.

Petitioner's next assertion of ineffective assistance of appellate counsel refers to the Court's instruction to the jury that the death penalty is presumed to be appropriate where the jury finds aggravating circumstances and no mitigating circumstances. The court instructed the jury that:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overidden by one or more of the mitigating circumstances . . . (R. 757 - 758)

The jury instruction properly states the effect of the Florida Statute as upheld in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). There was no error by the Court and no mistake by counsel.

The Petitioner next complains that his appellate counsel did not assert as error the admission into evidence of the photographs of the decedent's body. It would have been futile to do so (and, for that reason, a bad appellate tactic also) because the law of Florida is well settled that photographs taken at the scene of the crime of the body of the deceased, and objects near or around it, may be admitted in evidence. Mardorff v. State, 143 Fla. 64, 196 So. 625 (1940). If otherwise competent and material, photographs of a corpse are admissible in evidence though they portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury. Calloway v. State, 189 So.2d 617 (Fla. 1966); Wilkins v. State, 155 So.2d 129 (Fla. 1963); Savage v. State, 38 So.2d 47 (Fla. 1948); Mardorff v. State, supra.

The Petitioner says his appellate counsel should have challenged the constitutionality of Florida Statute 921.141 because of its express departure from the exclusionary rules of evidence and alleged denial of the right of confrontation, but he does not presently demonstrate by persuasive argument or citation of authority that such a contention would have had any hope of success especially in light of Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976) declaring the statute to be constitutionally valid.

The Petitioner says his appellate counsel should have challenged the admission into evidence of the testimony of Dr. Niswoger because of the psychiatrist-patient privilege, but the basis for that contention has already been considered and rejected (see the discussion concerning claim IX, *supra*, pages 22 - 25).

The Petitioner says his appellate counsel should have challenged the admission into evidence of non-statutory aggravating factors during the penalty phase of his trial, but the basis for that contention has already been considered and rejected (see the discussion concerning claim XIII, *supra*, pages 28 - 36).

The Petitioner says his appellate counsel should have challenged the trial court's alleged restriction of the jury's consideration of non-statutory mitigating circumstances, but the basis for that contention has already been considered and rejected. (see the discussion concerning claim XV, _supra_, pages 46 - 49)

The Petitioner says, lastly, that his apellate counsel should have had the voir dire proceedings transcribed and reviewed by the Florida Supreme Court, but no suggestion or representation is made that any _Witherspoon_* or other error actually occurred; and, even if it had, it was not preserved for review in the Supreme Court of Florida (see _Sullivan v. State_, 372 So.2d 938 (Fla. 1979)) or in this Court (see _Sullivan v. Wainwright_, 695 F.2d 1306, 1311 (11th Cir. 1983).

XIX

The Petitioner's nineteenth and final claim is that he was denied his right to due process under the Fifth Amendment; his right to effective assistance of counsel under the Sixth Amendment; and his right to regularity on the imposition of capital punishment under the eighth Amendment, all because the state courts never conducted an evidentiary hearing or hearings concerning his many claims other than the hearing held with respect to the claimed Brady violation. There is, however, no constitutional right to an evidentiary hearing when none is necessary to resolve the contentions advanced, i.e., when the claims asserted are fully capable of resolution by reference to, and reliance upon, the record already made in earlier judicial proceedings. Indeed, in most habeas cases that is the only appropriate manner of resolving the issues raised. Thus, in this instance, just as this Court has been able to resolve the Petitioner's contentions by a review of the record and without further evidentiary hearing, so also were the state courts justified in proceeding in the same manner.

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*_Witherspoon v. Illinois_, 391 U.S. 510, 88 S.Ct. 1770 (1968).

The Petition for a writ of habeas corpus is DENIED. The death warrant outstanding against the Petitioner having expired, the stay of execution granted by this Court on February 14, 1983, is MOOT and is therefore DISSOLVED.

The Clerk is directed to enter judgment dismissing the petition with prejudice.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 18th day of November, 1983.

[s]
UNITED STATES DISTRICT JUDGE

A-179

SUPREME COURT OF FLORIDA
STATE OF FLORIDA

DENNIS WAYNE SMITH,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

APPEAL CASE NO. 49,245
APPEAL VOLUME III

TRANSCRIPT OF RECORD ON
APPEAL FROM THE CIRCUIT COURT
OF POLK COUNTY, FLORIDA

HONORABLE OLIVER L. GREEN, JR.
PRESIDING JUDGE

ROBERT E. PYLE 145 East Haines Blvd. Lake Alfred, Florida 33850	OFFICE OF THE ATTORNEY GENERAL Capitol Building Tallahassee, Florida 32304
ATTORNEY FOR APPELLANT	ATTORNEY FOR APPELLEE

It's serious, sure, the defendant is on trial for his life; but the state did not create the circumstances that put him there. The state has only brought this charge to you to consider. The state did not create the circumstances, and I ask for your guilty verdict.

MR. HADDOCK: Ladies and gentlemen of the jury, this is indeed a time for trial for a lawyer in any case on either side, regardless of whether it's a criminal or civil case. In this particular type of case, the lawyer who is responsible for the outcome pretaining to the defendant has more responsibility than he will ever have at any time when he is practicing law. Again, I say to you, as has already been said, anything I say if it is in conflict with your recollection, if it is in error, it's an honest error.

If it helps you recall something that perhaps you were in error about -- because we're all human -- maybe we can straighten it out.

I do not feel the closing arguments as such are burdensome and are archaic as do many lawyers. I don't think it's a time, as it was when we were seating the jury, for visiting and for any type of humor. It's a time of great seriousness. It's the strongest thing we do. It behooves us to have, those of us who defend, to have our thoughts together. It is the highest point that there can be. If we do miss something, we hope that somehow we have skirted the issue so well that you will pick it up, good or bad. We are here for the truth, the ultimate turth, and I have explained my position. There is no need to dwell on that.

The Court is going to instruct you and you will, you will base your verdict on this thing. The Court is going to instruct you on reasonable doubt. If you find any reasonable doubt, anyone of you individually in your own minds that you do not resolve, then you cannot convict the defendant. You individually nor this jury collectively. That's the burden; that's your burden. It will soon be handed to you.

His Honor will read you because of the magnitude of this case a rather large volume of law. It behooves you to listen to him well because you will have to apply this law in coming to your ultimate conclusion as to the guilt or innocence of Dennis Wayne Smith in this case as he is charged with first degree murder of Mr. Arnsdorff by the method which you will have as a result of the indictment returned.

During the course of my arguments, and I've done this for years and I think the courthouse personnel becomes a little tired of it but it is effective, I have behind me on this wall a large neon sign. It's red. I somehow control the switch in my discussion with you, but I can't see it because my back will be turned to it; and it spells reasonable doubt. Ladies and gentlemen of the jury, if at any time in your individual mind I turn that sign on, Dennis Wayne Smith is not guilty. Now, let's get away from the, "I turned it on." If the facts I convey to you turn it on or the facts that I recollect with you turn it on, Dennis Wayne Smith is not guilty. That's the promise you made; that's why we took so long in examining you. Not nearly as long as we anticipated. This trial has gone much faster than we figured it would go, but you promised to use your mind to the best of your capacity to come to an ultimate conclusion of the guilt or innocence of this defendant based upon the facts which you will take into the courtroom and apply to the law which His Honor will give you.

It's that simple, and it's that complicated. Just as is my duty up here complicated, so will yours be when you retire to that jury room. I do not envy you; I would not trade places with you, because you have as I have already explained to you the greatest responsibility beginning to devolve on you that you will ever have in the upholding of the American way of life--to come to a fair and just conclusion pertaining to the guilt or innocence of a man on trial for his life.

Now, this case could really be called a slot machine case, couldn't it? You have got several people involved; in a slot machine you have several rollers. Let's make it a quarter slot machine so it won't be real cheap and it won't be real wasteful. You put a quarter in it and you pull the handle. The only thing you are certain of, ladies and gentlemen, is that you might not get your money back or any other money. That's the truth in a slot machine, and we have a slot machine case. Now, right there, the idea that you might not get your money back is the beginning of a reasonable doubt. As you watch these things go and they fall in line if you get so many cherries you get maybe a jackpot; a bunch of lemons, you're out of business. I'm playing that game with you only it's no game. It's for real. Like nothing you will ever find in a casino, nor is it like anything else you will ever run across in life as such except under these circumstances.

The burden of proof as indicated to you at the beginning of this trial is a tremendous responsibility; and it is on the state, because you agreed with me when we started this case that Mr. Smith was an innocent man. Now, our problem, which is yours because we are transferring it to you, is has this state carried that great burden on a first degree murder charge? Have they carried that burden beyond and to the exclusion of every reasonable doubt. That doesn't mean every doubt. His Honor is going to tell you what a reasonable doubt is and I'm not going to tresspass too much on his reading of the law because there is too much of it as it is. There will be too much of everything; but you, you are the ones who are here, and you are the ones who will have to know and understand.

Now, in order to discuss this matter with you, and, ladies and gentlemen of the jury, let me explain this. Under our rules of procedure Mr. Smith took the stand and testified and was subject to cross-examination. He brought in witnesses; and I therefore will not be back before you, which means neither will Dennis Wayne Smith, bcause I'm speaking for him in his place as his counsel.

And I must go over with you in more detail than has been done previously concerning the witnesses that appeared in this case in order to refresh your minds, and I hope not to bore you. I can't guarantee that this sort of thing isn't repetitious and boring, but it's somewhat necessary in order that we can do as has already -- feel as has already been mentioned to you when we go home. Oh, my goodness, I forgot one important point, and that one point might have tipped these scales on that reasonable doubt. So let me start with our witnesses and I will lace through this discussion personal things which I am allowed to say within reason.

Dr. Thorpe, my recollection, was the first witness. Obviously a competent dentist from Jacksonville, Florida. The last time he had seen the decedent was November 8, 1971. As a result of his testimony there was introuced into evidence, and you will have with you, small photographs which in truth and fact show the teeth in practically the same size as the larger photograph ultimately introduced, but do not show them in the same fashion. That's all Dr. Thorpe had to give to us.

Then Dr. Cardman, who is a dentist here in town, gave us the information that he made an X-ray examination of a rather--and we use this word because it's a good word--he made an examination of a rather exotic type. He did not do as would normally be done, and at least he did not testify that it would normally be done, and took the photograph of the mouth from a rather odd angle that would show all the teeth whereas this shows individual sections of the teeth. You will have an opportunity to study this. It will be part of the evidence which I assume will go into the courtroom--into the jury room with you. You be sure, you be sure, because that's it. Without an identification of Mr. Arnsdorff we have no, we have no crime.

These pictures are weather reports. I don't know what they show. I don't see any point in their being introduced, but if you want to see a certain portion of Polk County from the area and places marked out, that's fine. They were marked out and shown to you for whatever value they have. And frequently the Court is caught in a bind, so are the attorneys, in feeling that matters should go to the jury when they really don't have any business there; they are just that much extra.

We get to Dr. Holoman, who was the medical examiner, a medical examiner of the county. He is one of your employees. There has been pretty bad testimony about the circumstances surrounding the murder of Arnsdorff. Icepick, jabbing with tire irons. The only thing he says is that the man died from a suffocation in his trachea down into his bronchial tubes. I don't feel it's my duty to prove the state's case and I don't know what medical examiners do. Nor do I know what can be done, but it was not said negatively that there were no marks found on the decedent that indicated that he had been hit or struck with either an icepick in the bones or in the chest cavity anywhere. There was no evidence of that, albeit he had been badly burned in that automobile. There is no question about that. But there was no testimony from Dr. Holoman, and I wonder if there is no technique that can be used. I have wondered through this entire trial, gentlemen, ladies and gentlemen, about the rather lax techniques in the lacing up, the fast lacing up we have had to do--or that the state has had to do--to get this thing put together, if it is put together. And if they do, by their loopholes and openings and gaps like this, leave in your minds some reasonable doubt.

Now, Lieutenant Keeney testified only that there was a cause--he had something to do with the body as such and he was out of town. We did not need him. They read his testimony and it was agreed to by both the state and myself since he was going to a very important conference for police officers, that he should go and not be kept here. His testimony was not that important. You have heard it. You will give it whatever value it's worth.

Now, I will talk about some other people and we will come back to the man that apparently has been said to be on trial here, because he is on trial here a little bit. He is on trial about as much as anybody ever saw, and we are going to put some pieces together about him if we can.

Mr. Toney testified only that he was a paper route man, he saw the fire burning, he saw a corpse in the trunk. This is conclusive testimony and unrebutted.

Deputy Wood, who is also somewhat of a weather report type situation, said that he went out to Lake Luther Road and saw the burning skull; and Sergeant Boydston and Lieutenant Keeney, Al Lang and Mr. Toney all came out, and the photographic section of the Sheriff's Department began to function and do its duty as it should have done in regard to this matter.

Sergeant Charles Duke, who has had a good bit of experience in police work, poured these plaster casts. He said that he had taken a lot of photographs. He took the photographs of the area and he took the plaster casts. They are in evidence; we will get back to them and talk about them. There is no argument with his work. Some argument with the necessity of all the pictures, but they are there and if you want to look at all of them they are there. He showed just about everything that can be shown.

Now, we had out shoes question situation that was after the, after the alleged crime; the shoes were taken for identification voluntarily given by--they didn't have to snatch them off him or anything. He gave them to them for identifying the defendant, Dennis Wayne Smith. And Sergeant Al Lang then made a print, he said, out at the place of these tennis shoes. He could not find an adequate--or place in this area that sold that type of shoe; so they took the evidence to the FBI, the evidence being apparently only the tennis shoe print made out of a plaster of Paris cast. The cast of the tire was then physically taken to the FBI, and also the tire. So far as we know that's all they took up there. They searched the car of the defendant. Some question was as to whether the search was properly administered, but that's a legal question, not one that concerns you.

I want to talk about the FBI agent, Mr. Hegvold, a little bit. He testified he had a bachelor of science degree and also a master of science degree from George Washington University, which as most of you know is a great university within the City of Washington. Apparently been an FBI agent for many years. He examined the evidence; he said he had examined evidence in hundreds of instances on both tires and shoes. Now, the tire --I'm not going to bring the tire over if I can see the markings on it. That's what they took up. they have identified this and I say to you, ladies and gentlemen, so what? This tire is obviously, I mean this cast is obviously according to that expert testimony the cast from a portion of this tire. I think he pretty well botched it up, and it makes me a little worried about him when he says the tire was in the same position when this mark was made that it's in now when you and I--you're a jury or you're the one who discerns the fact. You know that a tire lying flat on the surface is spread out and under that tread is wider. There was nobody's attempt to fit this tread into that tire as it presently sits. There was no attempt made. I certainly am not going to make one, but you will have the opportunity to. It really doesn't make any difference about this. We will consent and concede that this is from that tire, but I want you to know that the continuity of sloppiness goes right on up to the FBI in the presentation of this case because that man did not give good FBI testimony. And I think you folks know that he did not give good FBI testimony. When I can wind up with a law book in a country courtroom like this on top of a tire that's covers only about three-quarters of an inch, then he starts talking to me about being a spread in the tread, of course, and he assumed the car had been moved and all that kind of hot-shot I don't know. You are expected to take that as the greatest expert we had.

We wonder, we wonder if Mr. Hoover, with all his disadvantages and all of his wrong things, wouldn't have sent this man out to Quantico for some other purpose besides testifying in Court.

I don't know how the FBI is working these days. I know how this FBI agent is working these days, but he could not identify this as being the exact shoe. Reasonable doubt? Do you think this is the only pair of these shoes made? It's an eleven, not a big size , not an overly big size. Somebody identified that; I doubt that he knew. He didn't know what make they were, and it says P.S. on the back, for crying out loud, whatever that means in the way of the make. Did this man have the Monday morning blues, or what was his trouble when he was doing his identification work and how much credance and value can you give this type of evidence as such?

Let's talk about these shoes a little bit. The defendant testified that they were in his automobile and that he lent the automobile to Johnson. You know, we are not pumping up wild stories here. We are talking about some wild things that happened, but is it possible that with these shoes and his automobile that this little Johnson could have worn them during the perpetration of whatever happened here in order to implicate Smith in what has certainly happened? Reasonable doubt? A question in your mind about that, or is it completely clear in your mind that because that man who didn't even know the name of these shoes said that it was possible that they could have been worn by him? Or at least possible that it was the same shoe.

He never did say they could be worn by him, just said it was possible that it was the same shoe; and we have connected testimony that the shoe came from Mr. Smith, so there is no question about that.

Reasonable doubt, reasonable doubt. Life, electric chair. We are not making any deals. We had no deal. You make the deal for us based on that kind of testimony from the finest people in the world, the Federal Bureau of Investigation. Maybe instead of, well, I have traversed too far afield.

I think it's proper for me to say of all the testimony given, and much of it has been very irritating, that personally to me was the most irritating and the most disappointing because it came from such a reknown source as the Federal Bureau of Investigation.

Reasonable doubt.

Now, we get into this situation here, gentlemen, I want to tell you this--ladies and gentlemen. I get in trouble with this; I don't now, for crying out loud, I just ought to say persons, then we would be better off, but I, I just don't know what to think about the Green Parrot. We had some people come in here and talk about it and it appears that the three things in the Arnsdorff case are Lurch, and you have seen him walking in and out of here enough to know how big he is; and a great deal can be made about the fact everybody saw Lurch. Well, everybody is going to see Lurch as long as he lives because he is a big man and particularly if he has a floppy hat on. Whether he has a hat on or not, you're going to see him. You've looked at him; look at him. You know what he is; he is in evidence; he is your prime piece of evidence. You have looked at him, listened to him, watched him, noticed him throughout this trial. I have seen you doing it; that's your job, and I'm glad you were doing it.

We have in this case the Green Parrot, a white Cadillac and a pair of tennis shoes and a bunch of people that saw Lurch. But nobody but one person has come in here and put Lurch where he shouldn't, shouldn't be by direct testimony. The rest of it has been by indirect testimony based upon findings of detectives and such great and wonderful people as this FBI agent.

I, you know, these fellows that went in there, you saw them, you are all grown people. You know what I'm talking about. I don't know whether we're going to fall as Rome did or whether we are going to live, but I can't make comments about these people. They are really not material. Their personalities are not too material to this case except that all they have done through the case is talk about queers so that lets me talk about them a little bit. One of their material witnesses is a man who has elected over a period of his life to make his money running a gay bar. And you are asked to believe his testimony and take as a great and wonderful thing in our American culture. We had a parade of men in here, none of whom could lower their voices below a falsetto almost, testifying that they saw Arnsdorff at the Green Parrot. So what? Nobody denied he was at the Green Parrot He didn't deny it; the state hasn't denied it. There was no denial that he was at the Green

Parrot or that he shot pool at the Green Parrot with Arnsdorff. Weather reports, weather reports.

Now, let's go back to something that is not a weather report. Let's talk a little bit about the man, Wesley Irvin Johnson. Then we will talk about the sign. Watch that sign while we are talking about him and his testimony.

Well acquainted with Smith, Lurch, Slick. And let me tell you what he has done. He has entered a nole contendere plea which means he has made no contest plea--this is by his own testimony---with the Court for multiple murders and he has not yet, ladies and gentlemen, been sentenced. He has made what is known as a deal, but the deal hasn't been closed. What's the consideration for the contract he made? It's to testify against the defendant here. That's the way we are runing this trial. Without Wesley Irvin Johnson we wouldn't be here. Without his testimony we wouldn't be here. There wouldn't be any trial. There wouldn't be sufficient evidence to have stayed in this courtroom without his testimony. So what does he get out of it? He has told you he is going to get 25 years; the state has mentioned 25 years. He has no guarantee that he will get out. Reasonable doubt come in your mind when you get to the idea of a man--and you saw his personality, a weak personality, little man under the duress he is obvioiusly under from a strong personalitied wife, and the strength exhibited by the police force here. I'm glad they are strong and exhibit strength, but they overwhelm you; and he comes into this great courtroom and the majesty of the law gives him a deal. "Are you going to tell us about Lurch?" And he does and he does not go to the electric chair. He has not got any chance of going unless he changes his testimony. This is conjecture, but is it within the realm of reasonable doubt? Is it, gentlemen? Ladies?

I don't think we need to go through the sordid affairs involved in what they planned to do at the Green Parrot. This business of rolling queers, it would appear to me after this case a man who is a homosexual is in extreme danger in this county. He should be given special protection. Whatever we think of him, he should be given special protection. But that's what it was all about. And we told you, the state and the Court and myself told you that the facts weren't going to be nice. They haven't been. They won't get any worse, but they won't get any better. We certainly can't say that, that the defendant has been a model citizen. But can you possibly fit in the fact that what he said was true, what Mr. Smith said was true about going home to bed and lending his car to Johnson? With the background he gave you of having been involved in a narcotic alcoholic binge for a good length of time prior to this happening, can you fit that in? Does that ring that sign back there, or is it absolutely inconceivable to you that he could have gone home and gone to bed?

They testified to the consumption of an astronomical amount of alcoholic beverages during that day. Does it not fit just a well on one foot as it does on the other? That Mr. Smith went home sick, drunk, narced up, with balls running around in front of his eyes when he shot pool? Does that not fit just as well as this little Wesley Irvin Johnson saying that Smith was with them and did all these horrible things? He is the only one that said this, you understand.

The only thing we have is a shoe print out there from the man who can't look on the back of the shoe and tell me the name of it. That's all we have got that gets him out there. That car being there, noting else was there, no fingerprints introduced, nothing introduced to show that Dennis Wayne Smith was at the scene of the crime. Do you realize that? We are dealing in a car which he said he lent to Johnson and we are dealing in a heelprint and a lot of other mess which we will get to and go over.

Is it possible that Johnson, in his

great fright, fabricated this story? Is it any way possible that he fabricated this story about Smith? He was frightened, testified to that. He came back here apparently over his wife's objection. His wife is a great deal older than he is on a comparitive basis in age. She exerts some influence over him, but he was apparently a young man who floated around a lot; he testified that he did. He was in Daytona, I assume because you are members of a jury that some of you know what is in Daytona. He was in and out of Daytona and Lakeland in the Green Parrot and associating with Smith. He slept where he could find a bed. Is it possible that he took that white Cadillac and he and the other man went out and killed Arnsdorff, burned him, they went out and he killed the other man? Is that possible? Or is it absolutely necessary that Smith be there? Was there any situation where it took three instead of two?

I'm pulling that handle harder, ladies and gentlemen, that slot machine is running around. Do you know where it's going to stop for sure? Do you know whether we are going to come up with lemons or oranges or cherries or whether we are going to hit the jackpot? Do you think anybody knows? The whole crowd testified they had been drinking so much they didn't know what was going on.

Smith has been in jail for months. It has been testified that he is in a completely different physical condition than he was in when he first came in jail. His looks are different; he has put on 20 pounds. He is a different man. Could he sit down before you yesterday as he did and testify and testify truthfully.

You see, there is no question about it, and let's get this straight. A terrible thing to say, Dennis Wayne Smith is here today because he has no alternative but life imprisonment or the electric chair. No deals have been made with him. So who has the better, better opportunity? Who should lie? Wesley Irvin Johnson? Or Dennis Wayne Smith?

All right, let's carry this one step further. It behooves both of them to lie, how do you like that? It behooves both of them to lie. That's a terrific thing to dump in your lap, and you are going to have to decide who was lying about what and when, if there was lying on the part of anybody, and it had to be because they remember completely divergent stories. Somebody was telling a lie and a bunch of them. Was it Johnson, who has this in limbo deal with the state, or was it Dennis Wayne Smith, who knows what he is facing, who sat down in front of you yesterday and with much more, much more containment and much more composure than I ever thought he could gather told you as straight a story as he could.

We had some rebuttal testimony, we had two men come in and say they heard Wesley Johnson say he had committed all the crimes. Wesley on the stand said, "Well, I did, then I didn't, I got nervous," and everything. He was worried about getting an icepick in him. I don't know whether he is worried about getting an icepick in him or worried about getting strapped in a chair. He is worried, anyhow. I will concede he has something to worry about, but he stuck to his story. He elected to do that. And there was introduced into evidence and you will have it with you a statement from him, there was a note from Wesley Irvin Johnson which said, "Play it cool, don't worry, everything is going to be all right. The chair has come back, I hope I don't get it." Do you remember admitting that he wrote that note? Don't forget that. Don't forget that. You have a man who was flipping a coin; half the time he is on one side, half the time he is on the other side. You are going to think I'm a compulsive gambler if I keep talking about slot machines and flipping coins, but that's the sort of situation we are into today.

That note is very, very important that you do remember that note. It was admittedly signed by him, admittedly sent to the defendant, and received by him.

The state had knowledge of it and we had knowledge of it.

The testimony this morning, by the way of rebuttal, you can take it for what it was worth. It was a little bit more lacing up. I think it was necessary lacing up on the part of the state because there was some things left open. They brought in Mrs. Johnson, who stated that her husband was frightened by this situation. Ladies and gentlemen, I submit to you, wouldn't he have been just as frightened by this situation if Dennis Wayne Smith wasn't involved as he would have been if he had not been involved? Can't it go either way? Isn't what happened out there that was described by Johnson enough to frighten any man without anybody else being involved with him who is still alive, isn't that true? So is her testimony worth anything? She was very loose about where he is when he is, what he is doing. Can you take her testimony beyond and to the exclusion of a reasonable doubt that he was away from homne on the night of this incident, that he didn't stay in some house somewhere just as the defendant said he did?

She hasn't had a very good life. I don't know what she is going to get with a husband who is in this kind of trouble and she has two children by another man. It really doesn't behoove her to tell any lies. I don't think she did; I just don't think she knew anything. I don't think what she said had anything to really add to or take away from the situation.

They brought in Dr. Niswonger, who testified that Dennis at the time he interviewed him didn't, didn't recall.

Well, is it within the realm of possibility, and you can conjecture on this some since you had medical testimony. Isn't it in the realm of possiblity that Dennis was about to a stage at that time that he didn't want to recall anything? It's not at all unfair to Dennis for you to think that there have been times when he didn't tell the truth. His Honor is going to charge you on that. We are not dealing with a bunch of people whose bench mark is the truth and veracity. We are dealing with a group of people who have lived in the strata of society that few of us know. It is an unfortunate strata of society, but it has to do with the misrepresentation of life or a hiding from life, as he candidly told you.

I've forgotten what he said, he said he was going to change his act. Not a bad phrase, he was going to change his act or he did change his act. I can assure you he did, because he could no longer get narcotics or whiskey and that will help you to change your act, all right. This is what has happened to Dennis Wayne Smith.

Now, there are many more things that I could bring out to you. I am not unaware of certain time elements involved and attention spans. I'm also not unaware of the fact that we are both in a place where we don't want anything left unsaid, but I'm, practically through saying my say.

I want to thank you for your kind attention on behalf of my client. Not currying favor with a jury,--I would kick off, or ask the judge to if you hadn't given your kind attention to this case, you can be assured of that--but this has been an attentive jury.

I do not pass upon the guilt or innocence of Dennis Wayne Smith. You do. Each one of you men told me when you took this seat upon this jury that you understood that nowhere except on a field of battle would you ever in this county in the name of this county would ever have a greater responsibility than you have sitting on this jury. And you ladies, as mothers, know what I'm talking about. You have undertaken this voluntarily because there is not a one of you that had to sit here. The Judge would not have forced it. I urge upon you that you not forget your vows and your oath given--and the one oath you took, because there were many, because both the state and defense elicited from you many promises. You remember those promises when you go back in the jury room. You remember that the main thing here is Dennis Wayne Smith and what his future is. The question of guilt or innocence. The question of a white Cadillac, one tennis shoe, a pool game with a deviate in a beer joint that catered to them. The testimony of a man who is in serious trouble, Wesley Irvin Johnson. That fundamentally is your case, ladies and gentlemen.

If there is anything in this case as I presented it to you or as it will be presented further by the state in rebuttal or has already been presented to you or comes to your mind individually--because that's the most important thing is your mind, not mine. I am not pumping your mind; I'm refreshing it. If anything comes to you that raises a reasonable doubt, this man should not and cannot, if you are honest with yourselves, be convicted.

Thank you.